In The
Supreme Court of The United States

February, 1943, Term.

No. 792

MAX STEPHAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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MAX STEPHAN, *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner herein, Max Stephan, by Nicholas Salowich and James E. McCabe, his attorneys, respectfully represents to this Honorable Court:

I.

That for a summary and short statement of the matter involved, he says:

1. That June 17, 1942, petitioner was indicted for the crime of treason in the District Court of the United States for the Eastern District of Michigan, Southern Division, in one count, charging thirteen overt acts (R. 1-6) under R. S. 5331; March 4, 1909, C. 321, Sec. 1, 35 Sta. 1088; U. S. C. Title 18, C. 1, Sec. 1. He was arraigned on this indictment June 20, 1942, and stood mute (R. 8); trial was begun June 29, 1942, before Hon. Arthur J. Tuttle, one of the judges of said Court, and a jury; on July 1, 1942, the jury returned a verdict of guilty as charged (R. 342); on September 5, 1942, the court imposed a sentence that he be "hanged by the neck until he, * * * is dead" (R. 362).

2. Thereafter, to-wit, July 3, 1942, a motion for a new trial (R. 21) was filed, and the same was denied July 13, 1942 (R. 23).

3. Thereafter, to-wit, July 18, 1942, a notice of appeal to The United States Circuit Court of Appeals, Sixth Circuit, was filed. On September 9, 1942, the record on appeal was certified (R. 365) and briefs were filed in the said Circuit Court of Appeals, and an argument by counsel had, and on February 6, 1943, that Court affirmed the sentence imposed below (p. 37 of opinion).

4. Petitioner herein seeks a Writ of Certiorari to issue from this Court to the United States Circuit Court of Appeals, Sixth Circuit, to review its affirmance on February 6, 1943, of the sentence entered in the District

Court of the United States for the Eastern District of Michigan, Southern Division, imposed September 5, 1942.

II.

The basis on which it is contended that this Court has jurisdiction to review the determination of the United States Circuit Court of Appeals, Sixth Circuit, of February 6, 1943, is as follows:

1. Sec. 240 (a) of The Act of Congress of February 13, 1925, Chapter 229, 43 Sta. 936, as amended, provides that, "In any case, civil or criminal, in any circuit court of appeals * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * * to require by Certiorari, either before or after judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

2. It is claimed by petitioner that on the facts stated in division I above of this petition, this case falls within the said Act of Congress of February 13, 1925, Chapter 229, 43 Sta. 936, and that, therefore, this Court has jurisdiction as to subject matter to issue the writ prayed.

3. The determination of The United States Circuit Court of Appeals, Sixth Circuit, which is here sought to be reviewed was made February 6, A. D. 1943; the record in the office of the Clerk of this Court will show that this petition was filed within thirty days thereof and therefore within the time prescribed by Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934, pursuant to The Act of Congress of March 8, 1934.

4. Wherefore petitioner claims this Court has jurisdiction to issue the writ prayed; a separate statement as to jurisdiction is filed herewith, in typewriting, as required by Rule 12, as amended by order of this Court dated April 6, 1942.

III.

The questions to be presented in the review sought are as follows:

1. In the aforesaid appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division, to the United States Circuit Court of Appeals, Sixth Circuit, twenty-five errors were assigned in as many separate assignments of error, each being directed to a separate error in the proceedings in the trial court; some of these assignments of error were grouped together for argument, being thus more conveniently discussed as matters of law, giving rise to eighteen questions of law, all of which were decided adversely to petitioner by the said United States Circuit Court of Appeals, Sixth Circuit, in its determination of February 6, 1943, review of which is herein sought, said questions being as follows:

A. (a):

> "Question 1. Do the overt acts in the indictment support the charge of treason, and does the indictment with particularity and certainty charge the crime of treason?"

(b) The overt acts charged in said indictment were as follows:

> "1. Said Max Stephan, on April 18, 1942, did travel by automobile from his own home at 7209

East Jefferson Avenue, Detroit, Michigan, to the home of Mrs. Margaretta Johanna Bertelmann, at 259 Philip Avenue, Detroit, Michigan, for the purpose of taking, and with intent to take, said enemy, Peter Krug, under and within his protective care and for the purpose of giving, and with intent to give said enemy, Peter Krug, aid and comfort; and

2. Said Max Stephan, on April 18, 1942, did solicit and obtain from Margaretta Johanna Bertelmann money and currency of the United States of America for the use and benefit of, and for the purpose of giving and with intent to give said enemy, Peter Krug, aid and comfort; and

3. Said Max Stephan, on April 18, 1942, did escort said Peter Krug from the home of Margaretta Johanna Bertelmann and to the automobile then being used by said Max Stephan, for the purpose of giving and with intent to give aid and comfort to said enemy, Peter Krug; and

4. Said Max Stephan, on April 18, 1942, did transport said enemy, Peter Krug, from the home of Margaretta Johanna Bertelmann to the place of business of said Max Stephan for the purpose of giving and with intent to give aid and comfort to said enemy, Peter Krug; and

5. Said Max Stephan, on April 18, 1942, about eleven o'clock in the forenoon thereof, at his place of business, 7209 Jefferson Avenue, Detroit, Michigan, furnished, supplied and gave to said enemy, Peter Krug, food, drink and personal effects and clothing for the purpose of giving and with intent to give aid and comfort to said enemy, Peter Krug, and

7. Said Max Stephan, on April 18, 1942, escorted said enemy, Peter Krug, to Haller's Cafe, 1407 Randolph Street, Detroit, Michigan, and bought something to drink for himself and said enemy, Peter Krug, and then and there did conceal and cover up the true identity of said enemy, Peter Krug, by introducing him as 'one of the Meyers boys' for the purpose of and with intent to conceal the identity of the said enemy, Peter Krug, and to

give aid and comfort to said enemy, Peter Krug; and

8. Said Max Stephan, on April 18, 1942, escorted said enemy, Peter Krug, to the Progressive Club, 3003 Elmwood Avenue, Detroit, Michigan, and bought something to drink for himself and said enemy, Peter Krug, and then and there did conceal and cover up the true identity of said enemy, Peter Krug, as a friend of his from Milwaukee for the purpose of concealing and with intent to conceal the identity of the said enemy, Peter Krug, and for the purpose of giving and with the intent to give aid and comfort to said enemy, Peter Krug; and

9. Said Max Stephan, on April 18, 1942, escorted and transported said enemy, Peter Krug, to the place of business of Theodore Donay, 3152 Gratiot Avenue, Detroit, Michigan, and introduced said Theodore Donay to said enemy, Peter Krug, and at which place said enemy, Peter Krug, related to said Theodore Donay the incidents in the escape of said Peter Krug from a Canadian military prisoner's camp in Ontario, Canada, and of his travel thence to Detroit, related his version of the conditions in and about said prisoner's camp in Ontario, and of the intended future travel of said enemy, Peter Krug, and at which place the said Max Stephan purchased some candy and gave the same to said enemy, Peter Krug, and at which place said Max Stephan solicited and obtained from said Theodore Donay money and currency of the United States which was given to said enemy, Peter Krug, for his use and benefit for the purpose of giving, and with intent to give aid and comfort to said enemy, Peter Krug; and

10. Said Max Stephan, on April 18, 1942, escorted and transported said enemy, Peter Krug, to a residence building at 54 Duffield Street, Detroit, Michigan, and arranged for the entertainment and accommodation of said enemy, Peter Krug, for the purpose of giving, and with intent to give aid and comfort to said enemy, Peter Krug; and

11. Said Max Stephan, on April 18, 1942, in the evening hours thereof, transported and escorted said enemy, Peter Krug, to the place of business of said Max Stephan and then and there entertained said enemy, Peter Krug, at dinner and gave him food and drink, and concealed the identity of said enemy, Peter Krug, by introducing him as a man from Milwaukee, for the purpose of concealing and with intent to conceal the true identity of said enemy, Peter Krug, and for the purpose of giving and with intent to give aid and comfort to said enemy, Peter Krug; and

12. Said Max Stephan, on April 18, 1942, directed and gave orders to others in arranging that said enemy, Peter Krug, should register as a guest at the Field Hotel, Field Avenue, Detroit, Michigan, and spend the night of April 18, 1942, as such guest of such hotel, for the purpose of giving and with the intent to give aid and comfort to said enemy, Peter Krug; and

13. Said Max Stephan, on April 19, 1942, escorted and transported said enemy, Peter Krug, from 7209 Jefferson Avenue, Detroit, Michigan, to Washington Boulevard and Grand River Avenue in the same city, entertained said enemy, Peter Krug, at breakfast, supplied him with food and drink, and arranged, purchased and paid for transportation by Greyhound Bus from Detroit, Michigan, to Chicago, Illinois, to assist said enemy, Peter Krug, on a journey through the United States, the object of which journey was to have said Peter Krug pass through Mexico, through the United States, into South America and thence back to Germany to resume active status as a member of the military forces of the government of Germany in the prosecution of the war against the United States, for the purpose of giving and with intent to give aid and comfort to said enemy, Peter Krug;''

(c) It was claimed in the United States Circuit Court of Appeals, Sixth Circuit, that their charges (1) were

ambiguous, uncertain and general, and (2) that they made out no cause of action—did not individually or all together constitute the crime of treason. The court discussed this question in its opinion and decided adversely to petitioner.

(d) This question was raised by assignments of error 1 and 3, which were as follows:

> "1. That the indictment does not allege the crime of treason.
> "3. That the overt acts alleged in the indictment do not support the charge of treason."

B. (a):

> "Question 2. Does aid and comfort to an individual for his sole benefit constitute aid and comfort to the enemy country?"

(b) After describing one Peter Krug as "a subject of the government of Germany and a member of the armed military forces of the government of Germany (with which the United States, at all times since December 11, 1941, have been at war) and a secret agent for, spy for, and secret representative of said government of Germany in the furthering and carrying on of its war against the United States, and an officer in the army of the government of Germany who had escaped from a military war prisoner's camp in Ontario, Canada, the said Max Stephan giving to said enemy, Peter Krug, aid and comfort," the indictment charged that petitioner did "unlawfully, feloniously, wilfully, traitorously, treasonably, knowingly and with intent to adhere to and to give aid and comfort to the said Peter Krug, an enemy, did do, perform and commit" the overt acts above set forth.

(c) It was claimed by petitioner in the United States Circuit Court of Appeals, Sixth Circuit, that these allegations (1) charged only acts of kindness to an individual, and not acts of adherence to an enemy, (2) that it charged no act of hostility, (3) that it charged no treason or act of treason. This was discussed and ruled adversely to petitioner by the United States Circuit Court of Appeals, Sixth Circuit.

(d) This matter was raised by assignment of error number 2, which is as follows:

> "2. That the indictment does not directly, and with particularity and certainty, charge Max Stephan with the crime of treason."

C. (a):

> "Question 3. Did the Court err in permitting witness Krug, a Nazi Luftwaffe Officer, to testify as a competent witness in a capital case in a Federal Court?"

(b) The witness, Peter Krug, was a prisoner of war of the Dominion of Canada (R. 37-38, 52-116), brought to Detroit to testify in the custody of Canadian military officers. He described himself as an Oberleutenant of the German Luftwaffe. He said, "I can't swear under foreign law, because I am a military man," and was permitted to affirm (R. 51-52). It was beyond the power of the court to punish him for contempt or any other misdoing (R. 83). He had been shot down over England August 28, 1940, and captured (R. 37-38). He had had no communication with Germany since his capture (R. 111). He appeared in court in full regalia as a German officer and gave the Nazi salute (R. 305).

Petitioner claims that the Nazi philosophy or ideology is infamous, that it is a part of that ideology that its adherents will lie, perjure themselves, or commit other crimes, with total abandon to gain their ends, that this is so fully recognized that our country was moved to engage in a great war to rid the world of it, that therefore Peter Krug, a confessed and patent adherent to that ideology, who would not swear, and who was beyond the power of the court to punish, did not have the requisites of a competent witness.

(c) This question was raised by assignment of error number 5, which is as follows:

> "5. That the Court erred in permitting an admitted and sworn enemy of the United States to testify as a competent witness."

D. (a):

> "Question 4. Did the Court err in permitting witness Krug to testify after giving the Nazi salute, and while attired in the full uniform of an officer of the German Army to the incurable prejudice of the substantial rights of the defendant?"

(b) The facts which form the basis of this contention are discussed in C (b) above.

(c) This question was raised by assignment of error number 6, which is as follows:

> "6. That the Court erred in permitting the witness Krug to testify while dressed in the full uniform of an officer of the German Luftwaffe to the prejudice of the defendant."

E. (a):

> "Question 5. Did the Court err in failing to compel witness Krug to answer proper questions on cross-examination?"

(b) The witness Krug was the most important witness of the prosecution. He refused to answer questions admittedly relevant and competent after the prosecution had had the benefit of full direct examination, saying, "It is a military secret" (R. 81). He refused to answer many questions that were the gist of proper cross-examination (R. 84, 87, 97, 114). We contend that his entire testimony should have been stricken and cannot form the basis for a conviction.

(c) This question is raised by assignments of error numbers 7, 8, 9 and 10, which are as follows:

> "7. That the Court erred in not compelling witness Krug to answer proper questions on cross-examination.
>
> "8. That the Court erred in not striking, on its own motion, the entire testimony of witness Krug after Krug refused to testify further on the grounds that he had been misinformed, misled and tricked into believing that he was helping to correct a wrong that he had himself committed.
>
> "9. That the Court erred in not striking witness Krug's entire testimony, when Krug refused to testify further thereby depriving and precluding defendant from further cross-examination.
>
> "10. That the Court erred in not striking testimony of witness Krug immediately after Krug, in open court, had confessed guilt of forgery and theft."

F. (a):

> "Question 6. Did the Court err in admitting incompetent, irrelevant, immaterial and obscene testimony which incurably prejudiced the substantial rights of the defendant?"

(b) (1) In the matter alluded to as the Von Werra matter the District Attorney was permitted by the Court over objection of counsel to elicit from the witness Krug testimony regarding a conversation he had had in a restaurant while he was in Detroit with a person named Donay, who was unidentified, about the German Consul furnishing $50,000.00 bail for Von Werra in an unidentified case. The witness knew Von Werra and stated he was a German flyer like himself. Krug knew nothing about the Von Werra matter except what he had read in the newspapers. The District Attorney, however, in a leading question stated that he had succeeded in getting back to Germany and had been killed in action (R. 70-74).

(2) The testimony of Alvina Ludlow (R. 185-190) and Ethel Merrifield (R. 190-193) was introduced over objection to show that Krug while in Detroit had experienced a wish for "a woman" and had been taken to a place and there had immoral relations with the witness Merrifield. This was gone into in detail. It was permitted to stand in the record until the next day when it was stricken in a manner resulting in impressing it more firmly in the minds of the jury (R. 261-263) and in the charge the Court again called it to the minds of the jury (R. 338).

(3) From the testimony of the witnesses Parker (R. 201-216, 233-235) and Gasteiger (R. 198-201) it was shown that Krug had been apprehended in San Antonio, Texas, May 31, 1942, six weeks after he had been in Detroit.

Over objection these witnesses were permitted to testify as to his statements at that time, and articles he had in his possession at that time were admitted into evidence —officers epaulets, a map showing Krug's bus route marked in pencil, a card with some writing on it and a revolver and ammunition he had secured in San Antonio. The statements were later stricken, without curative instruction, but the exhibits allowed to remain (R. 366).

(4) The witness Bugas (R. 217-232) was permitted to identify a typewritten statement said to be signed by defendant, called a "confession" (R. 222-226). It is claimed to be neither a statement against interest nor a "confession," but a recital of innocent doings, and did not comply with the law as to admissibility of a confession in a treason case.

(c) These errors were grouped under assignments of error numbers 11 and 21, which are as follows:

> "11. That even though stricken, the incompetent, irrelevant and obscene testimony relative to entertainment by immoral women, alleged in overt act ten, was prejudicial error."
>
> "21. That the Court erred in not instructing the jury that the written statement made and signed by the defendant after arrest was not a confession."

G. (a):

> "Question 7. Did the Court err in admitting incompetent and irrelevant testimony relative to acts and declarations of Krug elsewhere and subsequent to the overt acts charged in the indictment?"

(b) The facts that form the basis of this question are related in F (b) (2) above.

(c) These errors were pointed out in assignment of error number 11, which is as follows:

> "11. That even though stricken, the incompetent, irrelevant and obscene testimony relative to entertainment by immoral women, alleged in overt act ten, was prejudicial error."

H. (a):

> "Did the Court err in admitting the incompetent and irrelevant exhibits, i. e., epaulets, a Greyhound Bus Company map, a revolver and cartridges, Government's Exhibits 4, 9, 12 and 13, respectively, all of which were prejudicial to the defendant's substantial rights?"

(b) The facts that form the basis of this question are related in F (b) (3) above.

(c) This error is pointed out in assignment of error number 11, which is as follows:

> "11. That even though stricken, the incompetent, irrelevant and obscene testimony relative to entertainment by immoral women, alleged in overt act ten, was prejudicial error."

I. (a):

> "Question 9. Did the Court err in failing to direct a verdict for the defendant upon conclusion of the testimony, because there was fatal variance between the indictment and the proof?"

(b) At the close of the Government's case a motion for a directed verdict was made on the following grounds (R. 236):

> "First, there has been insufficient proof of the criminal and evil intent on the part of the respond-

ent to warrant the submission of this case to the jury.

"Second, there has been insufficient proof, total lack of proof that the respondent, Max Stephan, is a citizen of the United States.

"Third, that the great weight of the evidence is against a sufficiency of proof of the guilt of the defendant that warrants the Court in directing a verdict of not guilty."

This motion was denied (R. 239).

(c) This question is raised by assignments of error numbers 13 and 14, which are as follows:

"13. That the testimony failed to prove an overt act constituting the crime of treason.

"14. That no two witnesses testified to the same overt act."

J. (a):

"Question 10. Did the Court err in failing to direct a verdict for the defendant upon conclusion of the testimony because of the insufficiency of the evidence, and was the verdict of the jury a miscarriage of justice?"

(b) The facts in which this error appear is shown in I (b) above.

(c) This question is raised by assignment of error number 15, which is as follows:

"15. That the Court erred in denying motion for a directed verdict at the conclusion of testimony."

K. (a):

> "Question 11. Should the Court have declared a mistrial during the closing argument when the United States District Attorney made repeated reference to the defendant's failure to produce witnesses and made the direct statement that the defendant had not taken the stand?"

(b) In his closing argument the District Attorney said, "This is Max's statement as introduced here. And to that Max made no comment" (R. 311). He also said, "Krug's statement stands on the record in this case, ladies and gentlemen of the jury, absolutely uncontradicted" (R. 305). A very similar statement was repeated several times (R. 305). The District Attorney also said, "I hold no brief for him (Krug) as he stepped into this court room and gave a Nazi salute" (R. 305).

(c) This matter is raised in assignment of error number 16, which is as follows:

> "16. That the Court erred in permitting the United States Attorney, in his closing argument, to repeatedly make derogatory remarks tending to inflame the jury to the prejudice of the defendant's rights."

L. (a):

> "Question 12. Did the intemperate, improper, and inflammatory remarks, inciting passion, in the closing arguments of the United States District Attorney prejudice the defendant's substantial rights?"

(b) In his argument the District Attorney alluded to defendant, this petitioner, as "poor Max Stephan, * * * dumb Max Stephan * * * generous-hearted, good-hearted Max * * *" (R. 306). He intimated that this

was the kind of a case "where the death penalty would be absolutely unfair" (R. 303). He repeated the words "black-hearted traitor" (R. 306-307). He repeated five times, "No, Max Stephan, you won't get away with it" (R. 269).

(c) These errors are pointed out in assignment of error number 16, which is as follows:

> "16. That the Court erred in permitting the United States Attorney, in his closing argument, to repeatedly make derogatory remarks tending to inflame the jury to the prejudice of the defendant's rights."

M. (a):

> "Question 13. Did the charge of the Court clearly define the crime of treason?"

(b) Nowhere in its charge did the Court with any degree of clarity define the crime of treason, nor state or define its elements with any degree of clarity (R. 318-342).

(c) This matter is raised by assignment of error number 17, which is as follows:

> "17. That the charge of the Court did not clearly and with certainty define the crime of treason."

N. (a):

> "Question 14. Did the charge of the Court fully, clearly and with particularity define an avert act constituting the crime of treason?"

(b) Nowhere in the charge (R. 318-342) did the Court define or with any clarity explain "overt act" as that term is used in the crime of treason.

(c) This error is pointed out in assignment of error number 18, which is as follows:

> "18. That the Court erred in not instructing the jury definitely and with certainty what constitutes an overt act."

O. (a):

> "Question 15. Did the charge of the Court fully, clearly and with particularity instruct the jury as to what constitutes 'adhering to the enemy, giving them aid and comfort?' "

(b) Nowhere in its charge (R. 318-342) did the Court define or with any clarity explain the phrase or phrases "adhering to the enemy, giving them aid and comfort."

(c) This error is pointed out in assignment of error number 20, which is as follows:

> "20. That the Court erred in not fully instructing the jury as to what constitutes giving aid and comfort to an enemy country."

P. (a):

> "Question 16. Did the words and phrase which alleged Krug to be, 'a secret agent for,' a 'spy for,' and 'secret representative of said Government of Germany in the furthering and carrying on of its war against the United States,' incurably prejudice the defendant's substantial rights when the words and phrase were read, for the first time in the trial, by the Court in its charge to the jury; since the only testimony introduced was in direct refutation of those allegations?"

(b) For the first and only time in the trial the phrases of the indictment, "a spy for" and "a secret repre-

sentative of the said Government of Germany * * *'' as applied to Krug, was used by the Court in its charge (R. 328). There was no proof in the record of these words, for Krug was admittedly a flyer in the air wing of the German Army, captured by the British, interned in Canada, escaped to the United States, recaptured and redelivered to Canada, and brought here by Canadian officials to testify, and not in communication with any of his superiors from the date of his capture nearly two years before, with no training or instruction as to being a spy or secret agent.

(c) This question was raised by assignment of error number 22, which is as follows:

> "22. That the use of the words, 'spy,' 'secret agent,' and 'secret representative of the German government,' in the indictment, read, for the first time during the trial, in the charge of the Court, said words being wholly unsupported by any evidence, was prejudicial error."

Q. (a):

> "Question 17. Did the Court err in permitting the jury during the trial to separate each noon, and go home each night, relying solely on their discretion to protect them from unlawful exposure and the undue outside influences of personal contact, public sentiment, newspapers and radio?"

(b) The record does not indicate any effort on the part of the trial court to keep the jury from outside influences, not even the usual cautionary instruction. In fact, they were left to go their own way at each recess, with newspapers, radio and common talk being full of the case.

(c) This question is raised by assignment of error number 24, which is as follows:

> "24. That the Court erred in exposing the jury to undue outside influences and public sentiment by not placing the jury in custody during the trial."

R. (a):

> "Question 18. Did the evidence support and warrant the cruel and unusual punishment of hanging by the neck until dead?"

(b) The sentence was death by hanging (R. 25-26). It is contended that this sentence is grossly and shockingly disproportionate to any misdoing on the part of defendant and this petitioner.

(c) This point is raised by assignment of error No. 25, which is as follows:

> "25. That the evidence does not support and warrant the cruel and unjust sentence."

IV.

We submit the following as the reasons why this Court should grant the writ prayed for.

1. This Court has never, so far as has been ascertained, reviewed a treason case. This is the first treason case during the life of this Court wherein a defendant has been convicted by a jury on a treason charge. We are now in a state of war, and it is altogether likely that other treason cases will reach the courts shortly. The rulings of this Court on the questions presented by this record—many fundamental to treason—will be invaluable

as a guide in future cases, and will settle many questions now in doubt.

2. Many terms such as "overt act," "aid and comfort to the enemy," the word "treason" itself, and "adhering to the enemy," as set out in the Constitution and the Acts of Congress have never been defined or construed by this court. They are all fundamental to the crime of treason.

3. The issue as to whether a traitor shall escape just punishment or whether one charged with the crime of treason shall suffer the extreme penalty without a fair trial, thus striking a heavy blow at those fundamental rights which we are at the moment engaged in a life and death struggle to preserve, is of immediate and vital importance.

4. The dire penalty imminent to petitioner should arrest the attention of this court, commanding its full review to determine the justice thereof.

5. A direct appeal to this court from the trial court would have been a matter of right under The Act of Congress of February 6, 1889, C. 113, Sec. 6, 25 Sta. 656, U. S. C. Title 18, Sec. 681. When the appeal is expeditiously taken and fundamental questions raised, the policy of the law, as expressed in that Act of Congress, should be observed in the instant case.

6. Discussion and decision by this Court of the questions presented by this appeal will be of great service to the profession and to the people.

WHEREFORE, petitioner prays that this Court issue its writ of certiorari to the United States Circuit Court of Appeals, Sixth Circuit, to review its affirmance of Febru-

ary 6, A. D. 1943, of the conviction and sentence of petitioner, Max Stephan, in the District Court of the United States for the Eastern District of Michigan, Southern Division.

NICHOLAS SALOWICH,
JAMES E. McCABE,
Petitioners.

NICHOLAS SALOWICH,
JAMES E. McCABE,
Attorneys for Petitioner.

State of Michigan,
County of Wayne—ss.

On this 27th day of February, A. D. 1943, before me, a Notary Public, in and for said County and State, personally appeared Nicholas Salowich and James E. McCabe, to me personally known, who being by me duly sworn, did depose and say that they have read the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Michigan by them subscribed in behalf of petitioner; that they know the contents thereof and that the same is true of their own knowledge, except as to those matters therein stated to be upon information and belief and as to those matters they believe them to be true, and that they are duly authorized to sign such petition.

Marcella Wagner,
Notary Public,
Wayne County, Michigan.

My commission expires June 11, 1945.

In The

Supreme Court of The United States

February, 1943, Term.

No. .....

MAX STEPHAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF FOR PETITIONER.

STATEMENT OF FACTS.

This brief is filed in support of a petition for a writ of certiorari to the United States Circuit Court of Appeals, for the Sixth Circuit, to review that court's affirm-

ance of petitioner's conviction of treason in the District Court of the United States, for the Eastern District of Michigan.

Petitioner was indicted June 17, 1942, for treason in one count, reciting twelve overt acts. (There is no overt act No. 6) (R. 1-6). He was convicted (R. 10) before the Hon. Arthur J. Tuttle, one of the District Judges for the Eastern District of Michigan, by a jury, July 2, A. D. 1942, for the crime of treason, and sentence was imposed August 5, A. D. 1942 (R. 345-363) that petitioner, "Max Stephan, be remanded to the custody of the United States Marshal for the Eastern District of Michigan (R. 362), and be by him taken to the Federal Correctional Institution at Milan, Michigan, and there confined in safe and secure custody until the 13th day of November, A. D. 1942, and on that day, within the walls of the Federal Correctional Institution, or within an enclosed yard thereof, the said defendant, Max Stephan, be by the said United States Marshal hanged by the neck until he, the said Max Stephan, is dead."

Thereafter, August 11, 1942, a notice and grounds of appeal was filed (R. 27-28) and after a hearing in the United States Circuit Court of Appeals, Sixth Circuit, December 12, 1942, the court affirmed the conviction on February 6, 1943.

It is this affirmance by the Circuit Court of Appeals, Sixth Circuit, that petitioner here seeks to review by certiorari.

Briefly stated, the material facts as shown by the evidence are, that on April 18, 1942, Peter Krug, a German Luftwaffe officer (R. 52) age 22 (R. 101), arrived at the

home of Mrs. Margareta Johanna Bertelman in Detroit, Michigan (R. 55). He had been shot down over England nearly two years before, on August 28, 1940 (R. 52), was interned in Canada (R. 53), and made his escape across the Detroit River to Detroit (R. 53). He had never seen or known Mrs. Bertelman, but knew of her, because she had sent things to inmates of the prison camp (R. 80-175).

Mrs. Bertelman in some fright after Krug had made his identity known (R. 167) called defendant, Max Stephan, on the telephone, and asked him to come to her home (R. 57). Defendant was a man of 58 a naturalized citizen of seven years (R. 50) and a restaurant keeper. He went to her home (R. 58). On seeing the lad and hearing his story he told him he had no chance to escape to Germany as Krug signified his desire to do and defendant suggested that he return to the prison camp (R. 168).

Mrs. Bertelman left $20.00 on the table before the two men (R. 169-170) which Krug took (R. 60). Defendant then drove him in his own automobile to his place of business and gave him breakfast (R. 62). Mrs. Bertelman gave Krug some clothes Krug being poorly dressed (R. 60) (R. 166-169).

Later in the day defendant went with Krug to a cafe and bought food for both, and introduced him as "one of the Meyers boys." Krug had told Stephan it was his birthday (R. 63). Still later in the day they went to the Progressive Club, where Stephan bought drinks and introduced Krug as a friend from Milwaukee (R. 91-92). Still later they went to the place of business of one Theodore Donay. Donay gave Krug $20.00 (R. 69) and Krug told his identity (R. 68), related events of his

escape and told of his desire to get back to Germany (R. 68-69).

Later Krug and Stephan went back to Stephan's restaurant where Stephan furnished Krug dinner (R. 70) and refreshments, and again introduced him as a friend from Milwaukee (R. 74).

Stephan helped arrange for Krug to stay over night at a hotel (R. 74) which Krug did (R. 75). The next morning Stephan took Krug to the interurban bus station, purchased his breakfast (R. 76), bought him a bus ticket to Chicago, and saw him off on a bus to that city (R. 76), where Krug went (R. 76).

Krug did not start to leave this country until after he had gone from Chicago to Columbus, then to New York City, after which he headed for Mexico (R. 77). He was recaptured in San Antonio, Texas (R. 77).

By the testimony of two female witnesses the Government introduced testimony showing that on April 18th, Krug having expressed his desire "for a woman," he was escorted by Stephan to the home of the witness, Alvina Ludlow (R. 185-190) and there had immoral relations with the witness, Ethel Merrifield. This testimony was allowed to stand for one day, then stricken by the court (R. 261-263), together with the allegation in the indictment of the claimed overt act number 10 (R. 262).

While at Donay's place the latter and Krug conversed about a certain Von Werra (R. 70-73) whom Krug knew to have been a German flyer. The conversation related

to the facts that the German Consul had furnished $50,000.00 bail for Von Werra who had, as the District Attorney stated in leading questions (R. 73), escaped to Germany and been killed in action. Krug, the witness, knew nothing about the Von Werra matter except what he had read from newspapers (R. 72-73).

The testimony was objected to (R. 71) but the court admitted it (R. 71) stating that unless it was "connected up," which the District Attorney promised to do, he would strike it. It was never connected up and never stricken out.

On cross-examination (R. 78-111) the witness Krug refused to answer questions, stating sometimes that it was a military secret, and other times refusing for other reasons. The court refused to strike out the testimony of Krug but permitted it to stand. This was after full direct examination by the District Attorney (R. 52-81), and was followed by re-direct examination (R. 111). The court expressed itself as unable to compel answers to questions put by defense counsel (R. 82-83) evidently because Krug was already in custody as a prisoner of the Canadian authorities, and the court was not possessed of any weapon to compel answers.

In his argument to the jury the District Attorney repeatedly and insistently asked the jury to place themselves in the position of defendant (R. 309-310). He states, that this was the kind of a case "where the death penalty would be absolutely unfair" (R. 303). He attributed friendship between Krug and defendant (R. 304). He stated (R. 305), "Krug's statement stands on the record in this case, ladies and gentlemen of the jury, absolutely uncontradicted." He several times repeated

the phrase "black-hearted traitor," as applied to defendant (R. 306, 307) and several times said, "No, Max Stephan, you won't get away with it" (R. 269). He made allusion to defendant as, "poor Max Stephan,—dumb Max Stephan—generous-hearted, good-hearted Max—" (R. 306).

It is established in the record that Krug came into court and gave the Nazi salute when the District Attorney argued, "I hold no brief for him, as he stepped into this court and gave a Nazi salute" (R. 305). The obnoxious and uncalled for display of a German uniform, the emblem of the hated Nazi regime, flaunted before the jury, was palpably, incurable error.

From the testimony of the witness, Parker (R. 201-216, 233-235) and Gasteiger (R. 198-201) it is shown that Krug was apprehended in San Antonio, Texas, May 31, 1942, six weeks after the events occurred with which Stephan is charged. Over objection these witnesses were permitted to testify to statements made subsequent to Krug's departure from Detroit and they identified articles he had in his possession at the time, which had no connection with the charge and which were admitted into evidence—epaulets, a map showing Krug's bus route after he left Detroit, a revolver and cartridges. These statements were later stricken from the record, too late, without curative instruction, but the exhibits permitted to remain (R. 366).

The phrases "a spy for" and "a secret representative of the Government of Germany," as applied to Krug, were used in the trial for the first time by the court, when he read the indictment to the jury in his charge (R. 328). There was no evidence to support the use of

these terms. Krug was a flyer and had been a prisoner of war since he was shot down over England, without communicating with his superiors during the nearly two years ensuing (R. 111).

For three days and nights, during the trial when public feeling was tense, the jury separated at the close of each session, to go where they would, exposed to hostile sentiment, newspaper articles, and frequent radio broadcasts concerning the trial.

At the close of the Government's case a motion to direct a verdict of not guilty was made on behalf of defendant (R. 236).

This motion was denied (R. 239).

One month after verdict (R. 10) and after conferring with the probation officer together with special agents of the Federal Bureau of Investigation, the court imposed the disproportionate sentence of death (R. 345-363).

Such, very briefly, are the material facts as disclosed by the record and as alleged by the petition for a writ of certiorari.

SUMMARY OF ARGUMENT.

I. The indictment is bad for failure to allege overt acts that constitute the Crime of Treason. The overt acts alleged do not manifest criminal intent nor tend toward the alleged object of the crime. These allegations must be clear and not rest in mere conjecture. No hostile act is alleged, but merely, evidences an intent to assist an individual as distinguished from an intent to aid a country with which we are at war. Allegations of the crime of treason should not be construed so as to extend them to doubtful cases. Citing: *United States v. Robinson, 259 Fed. 685; Young v. United States, 97 U. S. 62; United States v. Werner, 247 Fed. 709; United States v. Herberger, 272 Fed. 290; 30 Federal Cases 18,272; Ex Parte Bollman, 8 U. S. 75; United States v. Schaefer, 251 U. S. 482.*

II. All of the overt acts alleged in the indictment were acts of aid to an individual that do not constitute acts of treason. A verdict should have been directed of not guilty on the motion of defendant for failure to prove aid and comfort to an enemy of the United States. Citing: *United States v. Fricke, 259 Fed. 673; United States v. Werner, 247 Fed. 708.*

III. The whole testimony of the witness Krug should have been stricken, for he was not a competent witness. He was a confessed adherent to the Nazi ideology which has as its tenet that it is proper to lie and perjure one's self with reference to "inferior" peoples to gain Nazi ends. He would not swear, and there was no way in which the court could compel him to answer questions, nor to adhere to the truth. He refused to answer most of the questions put on cross-examination—very pertinent questions, effectively depriving defendant of the

fundamental right of cross-examination. The court could not discipline him. Krug presumptively did not regard the sanctity of an oath. Though he was not shown to have been convicted of any infamous crime, he did confess to forgery and larceny. For all of these reasons he was incompetent as a witness. Citing: *West v. Louisiana, 194 U. S. 258, 48 L. Ed. 965; Glasser v. United States, 86 L. Ed. 405; United States v. Robinson, 259 Fed. 69; United States v. Reid, 12 Howard 361; Logan v. United States, 144 U. S. 263; United States v. Black, 24 Fed. Case No. 14,609; 5 Jones Commentaries on Evidence (1st Ed.) 842; Adgine v. Ch. Hosp., 261 U. S. 525; Wigmore on Evidence (3d Ed.), Paragraphs 1390, 1391; Eng. Bushel v. Barrett, R. & M. 438, 21 ECL 790; Reg. v. Webb, 11 Cox C. C. 133; 7 Comyns Dig. p. 447; Eng. In re Ville de Varsovie, 2 Dods. 174, 16 C. J. 60; Webb v. State, 29 Oh. St. 351; Rex v. Priddle, 2 Leach C. C. 496; Eden Prin. P. L. C. 7, Sec. 5; Pendock v. Mackinder, Willes 665; Gilb. Ev. 143; 2 Hawk C. 46, Sec. 102; The King v. Priddle, 1 Leach (4th Ed.) 442.*

IV. The presence of the witness Krug in court and on the witness stand in full uniform of an officer of the German Luftwaffe, together with the testimony of irrelevant and prejudicial matters, such as a purported conversation between Krug about a German officer named Von Werra who allegedly had been furnished bail by the German Consul and had escaped to Germany to rejoin the air force, such as Krug's visit to, and an act of immorality with a lewd woman while in Detroit, his statements and innocent articles in his possession, six weeks after the alleged crime was committed, all so incited prejudice that a fair trial was impossible. Citing: *United States v. Bollman, 8 U. S. 75; United States v. Ogden, 105 Fed. 371; Mattox v. United States, 146 U. S. 140; McKibben v. Railway Company, 251 Fed. 577; Todd v.*

United States, 221 Fed. 209, and cases cited; Sprinkle v. United States, 150 U. S. 59, and cases cited.

V. The testimony of Krug should have been stricken in its entirety because of his refusal to submit to cross-examination. He barred counsel for defendant from legitimate inquiry regarding his intentions with reference to getting back to Germany and ability to get there, thus reflecting directly on the question of whether defendant's acts were giving aid and comfort to the enemy, and also from practically all legitimate subjects of cross-examination. This resulted in incurable and patent prejudice to defendant, because Krug was the Government's principle witness, and the subjects that might have been the basis of cross-examination went to the heart of the charge brought. Citing: *Adgine v. Ch. Hosp., 261 U. S. 525; 5 Jones Commentaries on Evidence (1st Ed.) 642; Wigmore on Evidence (3d Ed.), paragraphs 1390, 1391.*

VI. Nowhere in its charge did the court define treason, nor explain its elements adequately and clearly, and the jury received no knowledge of the legal requirements as to what the prosecution had to prove. Citing: *Const. Art. 3, Sec. 3, Cl. 1; R. S., Sec. 5331; Mar. 4 1909, C. 321, Sec. 1, 35 Sta. 1088; U. S. C., Title 18, C. 1, Sec. 1; United States v. Burr, 25 Fed. Cas. 14692, 14693; United States v. Greiner, 26 Fed. Cas. 15262; 30 Fed. Cas. Nos. 18271, 18272; United States v. Fricke, 259 Fed. 673; United States v. Robinson, 259 Fed. 685.*

VII. The motion for a directed verdict of not guilty should have been granted, because there was a variance between the indictment and proof, and no evidence, attested by two witnesses of any overt act of treason, and no evidence of treason. Citing: *United States v. Seymour, 50 Fed. (2d) 930; United States v. Werner, 247 Fed. 708; United States v. Bollman, 8 U. S. 75; United*

States v. Robinson 259, Fed. 691; United States v. Burr, Fed. Cases No. 14693; Sprinkle v. United States, 150 U. S. 56.

VIII. A mistrial should be declared because of the intemperate remarks made by the District Attorney in his argument.

He alluded to defendant in a derogatory and inflammatory manner, commenting on his failure to produce witnesses, and to testify himself. Citing: *Meriber v. United States, 85 Fed. (2d) 425, and cases cited; Hilliard v. United States, 121 Fed. (2nd) 992; and cases cited; United States v. Nettl, 121 Fed. (2d) 927; McKurglet v. United States, 115 Fed. 982; Mayer v. United States, 259 Fed. 216; Weathers v. United States, 117 Fed. (2d) 585; Pierce v. United States, 86 F. (2d) 949; Towbin v. United States, 93 Fed. (2d) 861; Wilson v. United States, 149 U. S. 60; Milton v. United States, 110 Fed. (2d) 556; Berger v. United States, 295 U. S. 88; U. S. C., Title 28, Ch. 17, Sec. 632.*

IX. Defendant was prejudiced when the court, in its charge, for the first time in the trial, injected the phrase, "a secret agent for, spy for and secret representative of Germany in the furthering and carrying on its war against the United States," the same being inflammatory, unsupported by any proofs, and contrary to proofs. Citing: *Miller v. United States, 120 Fed. (2d) 973; Boadright v. United States, 105 Fed. (2d) 737; Coale v. United States, 18 Fed. (2d) 50; Stokes v. United States, 264 Fed. 18; Cline v. United States, 20 Fed. (2d) 494; Hurwitz v. United States, 299 Fed. 449; Weare v. United States, 1 Fed. (2d) 617.*

X. Error is claimed because the jury separated each noon and were liberated each night to return the following day. They were continually exposed to hostile public

sentiment, detailed daily newspaper accounts and radio comments, and were not protected from outside influences. Citing: *Stone v. United States, 113 Fed. (2d) 70; Klose v. United States, 49 Fed. (2d) 177; Mattox v. United States, 146 U. S. 140; Griffin v. United States, 295 Fed. 439; United States v. Marrin, 159 Fed. 767; Affirmed in 167 Fed. 951; Meyer v. Cadawalader, 49 Fed. 32; Simmons v. United States, 142 U. S. 148; Harrison v. United States, 200 Fed. 669.*

XI. The Sentence is invalid because it is shockingly and horribly disproportionate to the acts complained of. Citing: *Ex Parte Watkins, 7 Peters (U. S.) 568, 8 L. Ed. 786 42 (L. R. A., N. S.) 978 Ann. Cas. 1914A, 1248; 16 C. J. 1351, Footnote 46.*

For a series of kindly benevolent acts totally lacking rancor, hostility, hatred or any display of antagonism to this Country, the jury found the defendant guilty of treason after listening to an extremely lengthy charge. More than one month later, after conferring with probation officers and special F. B. I. agents, who brought to the court in chambers the entire personal history of the defendant, the court then pronounced the sentence of death.

The overt acts by no stretch of the imagination, standing alone or collectively, could be considered criminal in their nature, but even if so, could not rise above the dignity of a misdemeanor. It follows, therefore, that the sentence pronounced was not based upon the finding of guilt on the part of the jury but upon those extraneous matters injected subsequent to the verdict, resulting in a punishment far out of proportion. Punishment for any crime should be an attempt to reform the offender and set an example deterring others from committing similar offenses, the ultimate aim being the protection of society. The severity of the sentence passed, this petitioner claims, was a gross miscarriage of justice.

ARGUMENT.

I.

The Overt Acts Alleged In the Indictment Do Not Set Out a Valid Cause Of Action As None Of the Acts Standing Alone Or Tacked Together Constitute the Crime Of Treason By Adhering To, Giving Aid and Comfort To An Enemy Country.

Without going into the mechanics of an indictment, its formal requisites and prominent features, petitioner urges that every indictment, to be sufficient, must have embodied within it, and alleged with certainty and precision allegations of such overt acts which standing alone or tacked together constitute a crime against the Government.

The overt acts alleged in the indictment (R. 1-6) in the instant case do not set out a valid cause of action.

> "An overt act is one which manifests a criminal intention and tends toward the accomplishment of the criminal object." *United States v. Robinson, 259 Fed. 685.*

> "It must be of a character susceptible of clear proof and not resting in mere inference or conjecture." *30 Fed. Cases 18,272.*

Any act distasteful to group opinion might well be constructed into a criminal allegation in an indictment and yet not be in violation of law.

The mere fact that the body of an indictment alleges certain acts, and the form of the indictment be sufficient will not elevate an otherwise innocent act to the dignity of an overt act manifesting criminal intent tending toward the completion of a criminal objective.

The indictment in the instant case alleges that petitioner

> "during the 18th and 19th days of April, A. D. 1942, unlawfully, feloniously, wilfully, traitorously and treasonably adhere to one Hans Peter Krug, a secret agent and spy for, and a secret representative of the Government of Germany in the furthering and carrying on of its war against the United States * * *."

The Circuit Court of Appeals, Sixth Circuit, decided on February 6, A. D. 1943, that this indictment was sufficient, declaring that (page 16 Opinion):

> "It distinctly and clearly alleges each and every element of the offense necessary to be charged, including time, place and circumstances, and advised appellant of the charge he was required to meet, to-wit, that he had unlawfully, feloniously, traitorously, treasonably, knowingly, and intentionally adhered to and given aid and comfort to Peter Krug, an enemy of the United States, and in furtherance thereof had committed certain overt and manifest acts. These alleged overt acts, twelve in number, were set out in the indictment with exact and careful detail."

All that aside, petitioner respectfully submits that exactness and careful detail together with all the mechanics necessary to conform to the proper drawing of an indictment will not give the color of criminal intent to otherwise wholly innocent acts.

Quoting the United States Circuit Court of Appeals, Sixth Circuit, in its affirmance of the instant case, the court said:

> "We must keep in mind that one may not be convicted of treason upon evidence of an overt act, unless such act has been laid in the indictment. *Burrs Trial, Fed. Cas. No. 14,693, 25 Fed. Cas. p. 55; Whartons Crim. Law, 11th Ed., Vol. 3, Sec. 2153, p. 2310.* Further, although not explicitly set forth in either the constitution or statutory provisions, an intent to give aid and comfort to the enemy is an essential element of the crime of treason. *United States v. Werner, 247 Fed. 708, 709 (D. C.); United States v. Fricke, 259 Fed. 673, 676 (D. C.) cf; United States v. Burr, 25 Fed. Cas. No. 14,692 h, 52, 54 (C. C.) United States v. Burr, 25 Fed. Cas. No. 14,693, 55, 90 (C. C.);* see *United States v. Robinson, supra.* Without an intent to give aid and comfort to the enemy there is no treason. *Wimmer v. United States, 264 Fed. 11 (C. C. A. 6).*"

> "But there may be aid and comfort without treason." *Young v. United States, 97 U. S. 62.*

> "It is conceivable that a defendant may have this condemned attitude of mind or be what is deemed 'traitor at heart' and yet not expose himself to treason because he has created no hostile act." *United States v. Werner, 247 Fed. 709.*

> "In order to constitute treason the accused must in general be guilty of some act which has for its direct aim the furtherance of the hostile designs of the enemy while the state of war exists, which act involves a want of loyalty." *United States v. Herberger, 272 Fed. 290, quoting 30 Fed. Cas. No. 18,272.*

Diligent search of the cases indicate that the courts have experienced some difficulty in specifying the pre-

cise acts which constitute overt acts of treason against the United States by adhering to their enemies, giving them aid and comfort; but in all of the decisions, it is clearly indicated that such acts of adherence and the giving of aid and comfort must be hostile and disloyal acts directly in furtherance of the hostile designs of the enemy, and, if successful, would advance the interests of the enemy, and weaken or tend to weaken the power of the Government to resist or attack its enemies.

> "The intent in giving aid and comfort to the enemies must be to tender such assistance to the enemy of the Government, and not merely to assist another as an individual." *30 Fed. Cases No. 18,270; United States v. Fricke, 259 Fed. 673.*

The hiatus between misprision and actual participation in a criminal conspiracy to commit treason is vast.

In *United States v. Burr, 25 Fed. Cas. 14,693, et seq.*, Marshall, C. J., said:

> "As this is the most atrocious offense which can be committed against the political body so it is the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosom of contending parties struggling for power."

Carefully measured and scrutinized in the light of the facts in the *Burr cases*, and all subsequent cases in our country's history wherein treason was charged, the acts alleged as overt acts in the indictment in the instant case pale into insignificance. Petitioner respectfully submits that there is no overt act of treason alleged in the indictment; that no amount of testimony to such acts

could elevate one or all of them to the dignity of a crime against the United States; that none of the acts standing alone nor all of them tacked together constitute a valid cause of action for treason against the United States of America.

> "The crime of treason should not be extended by construction to doubtful cases." *Ex Parte Bollman, 8 U. S. 75, United States v. Schaefer, 251 U. S. 482.*
>
> "This high crime consists of overt acts, which must be proved by two witnesses or by the confession of the party in open court." *United States v. Burr, 25 Fed. Cas. No. 14,692.*

The Circuit Court of Appeals passed over the question of what constitutes an overt act of treason, and considered only the question of two witnesses testifying to the same overt act alleged in the indictment.

Petitioner respectfully submits that an indictment must allege with precision and certainty such overt acts which constitute a crime, and any other allegation cannot have the effect of making a mere trespass into a public offense.

II.

Petitioner Avers That Giving Aid and Comfort For the Sole Benefit Of An Individual, Without the Evil Motive and Intent To Adhere To and Give Aid and Comfort To the Enemy Country In Furtherance Of the Hostile Designs Of the Enemy, Is Not Treason.

The crime of treason embraces the existence of an evil motive and the resolve and intent to commit overt acts directly in furtherance of the hostile designs of the enemy country.

> "In determining whether defendant is guilty of adhering to, and giving aid and comfort the question of intent is a vital ingredient of the crime; and though he assisted an enemy alien, whom he knew to be such, he is not guilty where he intended merely to assist him as an individual, and not to give aid and comfort to enemies of the United States." *United States v. Fricke, 259 Fed. 673.*

The court in the *Werner case*, said:

> "It is conceivable that a defendant may have this condemned attitude of mind or be what is termed a 'traitor at heart,' and yet not expose himself to the charge of legal treason because he has committed no traitorous act." "It is also conceivable that one under the domination of folly or of factional feeling or directed by a perverted view of what he is doing, or even a wrong-headed conscience, may do what would otherwise be traitorous acts, and yet not expose himself to that charge because the acts, although carrying all the consequences of traitorous acts, were done without traitorous purposes or intent. Such a

man plays the part of a traitor, but is not a traitor at heart." *United States v. Werner, 247 Fed. 708.*

None of the evidence adduced at the trial showed a hostile scheme, motive or evil intent to subvert the Government of the United States or to adhere to and give aid and comfort to the enemy country.

Each and all of the twelve overt acts layed in the indictment (R. 2-6) were acts of aid and comfort for the sole benefit of an individual, all of them were devoid of the color of aid and comfort to the enemy country. Further proof that the defendant had no intent to aid the enemy country is found in the record (R. 37-38) which definitely and unequivocally shows Krug to have been a prisoner of war for twenty months (August 28, 1940 to April, 1942); that he had no possible connection or contact with Germany except through the Swiss Consul (R. 111) and could not have been, and was not, a spy for, secret agent, or secret representative for Germany, and had no thought to injure the United States (R. 108, 109).

III.

Krug, An Officer In the German Luftwaffe, Adhering To the Nazi Philosophy, Wholly Devoid Of Moral Principle, With Such Disregard Of the Obligation and Sanctity Of An Oath Or Affirmation Was To Bar Him From Giving Evidence In a Capital Case In a Federal Court Of the United States.

The Circuit Court of Appeals in its decision in the instant case on February 6, 1943, affirming the conviction of this petitioner stated:

"Appellant contends that because Krug was an officer in the German Luftwaffe and an adherent to

Nazi principles, he was therefore so infamous as to bar him from giving testimony and that the court should not have permitted him to testify. This proposition was not raised at the trial and was probably waived by appellant's cross-examination of Krug. However, we think it not improper to discuss it briefly."

"It is said that Krug was incompetent as a witness under the laws of Michigan and that the Federal Courts are bound thereby. Granted that this was the old rule, an important exception has been engrafted upon it. In *Funk v. United States, 290 U. S. 371,* the court said in substance that in criminal cases Federal Courts are not bound by such rules, but that in the development of truth they are to apply them as they have been modified by changed conditions. But all this to one side, we have been cited to no law of Michigan or decision of any Federal Court, that a German Army officer, although imbued with Naziism, is disqualified to give evidence in a court of justice and we make no such decision now."

Relying upon the rights of persons as guaranteed in the Constitution of the United States Amendment 6, petitioner respectfully submits that the right to be confronted by the witnesses against him guarantees the right to be confronted by *competent witnesses* and that "competency" as applied to witness involves both capacity and qualifications, and imports existence of all essentials to render him fit to testify.

"The right of a defendant to be confronted by the witnesses against him has been held to be a fundamental right." *West v. Louisiana, 194 U. S. 258, 48 L. Ed. 965.*

It cannot be said that a sworn enemy of the United States, an officer of the abhorrent Nazi Army, brought

into the jurisdiction of a Federal Court against his will and imbued with the philosophy of hatred and violence, and devoid of decency and morality as measured by civilized standards can be escorted in military custody of a foreign power to a witness stand in an American Court and then and there confront the accused, as a prosecuting witness, with no rule of law to prevent him from testifying against an American citizen.

Every accused having the Constitutional right to counsel must rely wholly on his counsel. If the failure of such counsel to raise proper and timely objection incurably waived an inviolable right of the defendant whose life and liberty was in jeopardy, depriving him of his substantial rights, such a rule would be repugnant to American justice and contrary to all substantial rights guaranteed in the Constitution.

Petitioner respectfully submits that the Honorable District Judge erred in permitting witness Krug to testify relying wholly on a rule of procedure which must be abrogated by the same changing conditions relied on in *Funk v. United States, 290 U. S. 371*, and cited by the Honorable Circuit Court of Appeals.

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Aetna Ins. Company v. Kennedy, 301 U. S. 389, 81 L. Ed. 1177, 57 Sup. Ct. 809; Ohio Bell Telephone Company v. Public Utilities Commission, 301 U. S. 292, 81 L. Ed. 1093, 57 Sup. Ct. 724; Glasser v. United States, 86 L. Ed. 405 (412).*
>
> "Federal appellate courts, will, in the exercise of a sound discretion, notice error in the trial of a criminal case, although the question was not properly

raised by objections below, where the refusal to review would shock the judicial conscience." *Weems v. United States, 217, U. S. 349, 30 S. Ct. 544; Oppenheim v. United States, 241 Fed. 625, 154 C. C. A. 283; Savage v. United States, 213 Fed. 31, 130 C. C. A. 1; Pettine v. New Mexico, 201 Fed. 489, 119 C. C. A. 581; Miller v. United States, 38 App. (D. C.) 361; Keliber v. United States, 193 Fed. 8, 114 C. C. A. 128; Dunn v. United States, 238 Fed. 508, 151 C. C. A. 444.*

The Appellate Court further says:

"When a witness takes the stand to testify, the law presumes that he is a competent witness and incompetency must be shown by the party objecting to him. *Wharton on Criminal Ev., 10th Edition, Vol. 1, Sec. 358, p. 721.*"

Does the court then mean that the error cannot be considered, it not having been raised at the trial?

"There is a well recognized exception to the general rule (passing on sufficiency of evidence not challenged in trial court) that, in criminal cases, involving the life or the liberty of the accused, the appellate courts of the United States may notice and correct plain errors in the trial of the accused which appear to have seriously prejudiced his rights, although these errors were not challenged or reserved by objections, motions, exceptions or assignments of error." *Kelly v. United States, 76 Fed. (2d) 847; 122 Fed. (2d) 461.*

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." *DeJianne v. United States, 282 Fed. 739.*

Witness Krug could not have been sworn at all in any reasonable sense, or in contemplation of law, nor could he attain the status of a competent witness by affirmation (R. 52).

> "Krug: 'I can't swear under foreign law, because I am a military man.' The Court: 'Then you may affirm. Our generous laws permit a witness either to take an oath or to affirm' (R. 51-52). 'I will permit you to affirm; but you are bound by the same law and penalties of perjury just the same as if an oath was taken.' Krug: 'I don't swear' (R. 52). The Court: 'Use the word affirm.' Krug: 'Affirm; yes, sir.'"

Petitioner respectfully submits that in the ceremony of swearing of a witness, to be effective at all, it is necessary that he understand and affirm the meaning of it without equivocation or mental reservation, prompted by a belief in the existence of a God and in reward and punishment. Otherwise his oath or affirmation could not bind him in conscience to the truth and nothing but the truth. An adherent to the Nazi regime and an exponent of its vicious philosophy cannot be said to bind himself in conscience by the mere holding up of his hand and nodding his head, knowing that by so doing he incurred no risk of punishment. He had no more bound himself than if he were of unsound mind.

> "The competency of a witness in a capital case is to be measured by the doctrine, when evidence is estimated quantatively, it is the support of the oath that counts." *United States v. Robinson, 259 Fed. 691.*

The *Funk case (Funk v. United States, 290 U. S. 371)* is not in point in the instant case and should not

overshadow the reasoning in and reliance placed on the long line of cases that come down to us from *United States v. Reid, 12 Howard 361, 363, 364, 366.*

The Circuit Court of Appeals in the instant case said:

> "Granted that this was the old rule an important exception has been engrafted upon it. In *Funk v. United States, 290 U. S. 371,* the court said in substance that in criminal cases federal courts are not bound by such rules but that in the development of truth they are to apply them as they have been modified by changed conditions."

Is it to be accepted as the rule now that truth has changed under the changing conditions set out in the *Funk case?* Petitioner urges that the *Reid case* is the ruling case established by *United States v. Reid, 12 Howard 361,* and sustained by *Logan v. United States, 144 U. S. 263, 309,* and the long line of cases which have sustained the *Reid case.* It was said by Chief Justice Taney in that case:

> "But it could not be supposed without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress. The law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789. The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has thus been sanctioned by a practice of sixty years."

Petitioner urges that witness Krug was infamous in the highest degree and was incompetent to testify in a criminal case in a federal court of the United States of America.

In *United States v. Black, 24 Fed. Cas. No. 14,609, 4 Sawy 211,* it was said:

> "the exclusion is on the theory that a person would not commit a crime of such heinous character, unless he was so depraved as to be altogether insensible to the obligation of an oath, and therefore was unworthy of credit."

At common law a person is incompetent as a witness if he has been convicted of an infamous crime.

> "The basis of the rule seems to be that such a person is morally too corrupt to be trusted to testify; so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all." *70 C. J. p. 105, fn. 23.*

An infamous crime is one which works infamy in the person who commits it. At common law it was one which involved moral turpitude and which rendered the party convicted thereof, incompetent as a witness. *(Eng. Bushel v. Barrett, R. & M. 438, 21 ECL 790).*

The crimes which the common law regarded as infamous because of their moral turpitude were treason, felony, perjury, forgery, and those other offenses classified generally are *crimen falsi* which impressed upon their perpetrator such a moral taint that to permit him to testify in legal proceedings would injuriously affect the pub-

lic administration of justice. Citing: *Bushel v. Barrett, supra;* and *Reg. v. Webb, 11 Cox C. C. 133; 7 Comyns Dig. p. 447.*

The term "*crimen falsi*" in the common law is applied to crimes which disqualify a person as a witness. *(Eng. In re Ville de Varsovie, 2 Dods. 174) 16 C. J. 60.* The definition *(crimen falsi)* affords no accurate guide * * * but it includes perjury, subornation, suppression by bribery, forgery of instruments, * * * etc. Citing: *In re Ville, supra;* and *Webb v. State, 29 Oh. St. 351; Rex v. Priddle, 2 Leach C. C. 496.*

Mr. Wm. Eden (afterwards Lord Auckland) in his *Principles of Penal Law,* which passed through three editions in England and at least one in Ireland within six years before the Declaration of Independence, observed: "There are two kinds of infamy: The one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent." *Eden Prin. P. L. C. 7, Sec. 5.* At that time it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime, and not upon the nature of his punishment. *Pendock v. Mackinder, Willes 665; Gilb. Ev. 143; 2 Hawk C. 46, Sec. 102. The King v. Priddle, 1 Leach (4th Ed.) 442.*

Cited *In re Wilson, 114 U. S. 417,* is the following:

> "and those convicted of perjury or subornation of perjury besides being fined and imprisoned, were to stand in the pillary for one hour, and rendered incapable of testifying in any court in the United States." *Act April 30, 1790, C. 9 (1 St. 112-117); Mr. Justice Wilson's Charge to the Grand Jury in 1791, 3 Wilson's Works, 380-381.*

It is well settled in law that the competency of witnesses in a criminal trial in a Federal Court must be determined by the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789. (Act Sept. 24, 1789, c. 21, Stat. 73).

In reversing the decision of the lower court, it is said in *Maxey v. United States, 207 Fed. (2nd) 327:*

> "It is urged in the brief of counsel for the United States that Congress has passed no law making the conviction of crime a disqualification. This is an erroneous view to take of the matter. The common law prevails until Congress shall decide otherwise."

The *Funk case* ends by saying:

> "It is plain enough that the ultimate doctrine announced is that, in the taking of testimony in criminal cases, the federal courts are bound by the rules of the common law as they existed at a definitely specified time in the respective states, unless Congress has otherwise provided."

In the *Scaffidi v. United States, 37 F. (2nd) 203, 207, 208,* the court adopted the language used in *United States v. Reid, supra:*

> "The rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits of the Constitution. But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases * * * in federal court." *United States v. Hall*

(D. C.) 53 F. 352; United States v. Hughes (D. C.), 175 F. 238; Denning v. United States (C. C. A.) 247 F. 463; Parker v. United States (C. C. A.), 3 F. (2nd) 903.

The next pertinent question is, what was the law of Michigan in 1789?

"The territory comprising the state of Michigan continued under British jurisdiction until July, 1796, and the Ordinance of 1787 was not in full effect as to such territory until after that time. Before that time the territory in civil matters, was governed by French law including the custom of Paris as modified by royal edicts. The French laws, as well as the English, Canadian, Northwestern Territory and Indiana Statutes were repealed in 1810. *1 Terr. Laws 900.*

"The Ordinance of 1787, for the Government of the territory northwest of the Ohio River, is no part of the fundamental law of the state since its admission into the Union. It was superseded by the State Constitution; and such parts of it as are not to be found in the Federal or State Constitution were then annulled. It was superseded by the Federal Constitution—but was revived and continued in force, with modifications, by the act of Congress of Aug. 7, 1799, and was finally superseded, so far as repugnant, by the constitution of each state formed from territory governed by it." *Mich. Stat. Anno., Vol. 1, page 115.*

The Common Law prevailed during the Government of the Northwest Territory and the Act to divide the Indian Territory into two separate Governments, 2 Stat. 309: Approved January 11, 1805, made no change in the then existing Common Law which prohibited infamous persons from serving on juries or giving testimony in a court of law.

When Michigan Territory was admitted into the Union as a state [Laws of 1836, page 57, July 25, 1836], the "convention, began at the City of Detroit, on the second Monday of May, in the year one thousand eight hundred and thirty-five," the Constitution was drawn. The Constitution and the statutes adopted thereafter failed to remove the disability of infamous persons in criminal cases in Federal Courts as required by the settled law.

Tested by the chaotic conditions resulting from the devastating war now involving the world the philosophy and practices of the Nazi regime is raised to the level of the most heinous criminal philosophy in all history. If the doctrine of the *Funk case (Funk v. United States, 290 U. S. 371, 54 Sup. G. 212)* should prevail it would become enlarged to the point where all civil rights would be threatened.

> "That rule of the Common Law, which renders a person incompetent to give evidence in a court of justice who has been convicted of an infamous offense, is not the consequence of an artificial system, or a state of society peculiar to certain communities, but is founded in the constitution and nature of human associations generally, and is dictated by the necessity, universally felt, of maintaining the purity of the institutions through which justice is administered. A man who stands convicted of falsehood by a tribunal having corrupted jurisdiction of the offense, is deprived of the common presumption raised by law in favor of witnesses, that they will tell the truth; he can no longer be confided in, when he deposes to facts and circumstances affecting the rights of others, and therefore the law, that the stream of justice may not be polluted, will not suffer such a witness to be heard." *(State v. Chandler 10 N. C. 393, 397). (70 C. J. 107, fn. 23).*

It seems that in some of the settled cases that conviction must precede the incapacity of a witness, but can the civil rights of an American citizen be abrogated, and a representative of a foreign power be permitted to testify in a Federal Court of the United States without the disability of infamy because a conviction does not precede?

While Krug has not been convicted of any infamous crime he did confess to forgery (R. 98, 99) and theft (R. 88) both infamous crimes, on the witness stand.

It seems to us that the court cannot fail to attribute to any adherent to the Nazi ideology that infamy that necessarily renders him incompetent to testify in any court of justice. That ideology embraces the doctrine that all but the "Aryan" peoples are "inferior," that it is the ordained predestination of the Nazis to rule and direct them and hold them in bondage, that it is entirely proper, and indeed commendable, to lie, to perjure, or to commit any crime against these "inferior" peoples to gain the Nazi aims. That the Nazis are imbued with these loathsome doctrines, and that they act accordingly is so thoroughly established among our people that we have committed ourselves to a great and bloody war and to risk the lives and limbs of ten million of our young people to rid the world of it. How can any court say that it is not infamous, and that one who believes in it has the requisites of a competent witness?

IV.

The Presence Of Krug As a Witness, Attired In the Full Uniform Of An Officer Of the German Luftwaffe, Was Incurably Prejudicial To the Defendant; the Admission Of Incompetent, Irrelevant, Immaterial and Obscene Testimony, Part Of Which Was Stricken Too Late, Violated the Defendant's Substantial Rights and Denied Him a Fair and Impartial Trial.

The presence of Oberleutenant Krug, testifying in the full uniform of the hated Nazi government (R. 52-111) incited passion in the jury and so prejudiced the defendant's substantial rights that a fair and impartial trial was denied him.

Great caution and exceeding care must be exercised to preserve the rights of a defendant on the trial for treason. As appropriately set forth in the *Bollman case:*

> "In times like these, when the public mind is agitated, when wars and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of the court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby establish precedent, which may become the ready tool of factions in times most disastrous. The worst of precedents may be established from the best of motives. We ought to be on our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The Constitution was made for times of commotion. In the calm of peace and pros-

> perity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to raise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude." *United States v. Bollman, 8 U. S. 75.*

Our laws have most jealously surrounded every defendant with safety barriers to prevent any possibility of unfairness or prejudice from reaching the jury, thus depriving that defendant of a fair and just trial. That is a guaranteed right of a defendant and if such an effort were made in behalf of this petitioner and if the Honorable District Court had limited the extent of Krug's testimony, and had the jury been cautioned and instructed to disregard his person as a witness, nevertheless Krug's presence before them, in the full uniform of a Nazi flyer, was as prejudicial as an improper statement, that even if struck by the court would come under the following rule:

> "And the evidence maybe so highly prejudicial in its nature, that no instruction limiting the purpose for which it may be considered can cure the error." *Burge v. United States, 26 App. 524.*

The Von Werra matter (R. 70-73) was incompetent and prejudicial. There was no relation between the Von Werra matter and the instant case. The objection of the trial attorney (R. 71) was overruled. The court speaking on the objection (R. 71-72) said:

> "'I don't know what the other case is myself. Nothing has been said here to indicate what that case is.' Mr. Babcock (District Attorney) (R. 71): 'That's right.' The Court (R. 72): 'Well, I will overrule the objection, but unless it is connected up I will strike it out. You have to start somewhere.

> At the present time I agree, I don't understand myself what it has to do with this case, but I will admit it and we will see and if it isn't connected up and doesn't have anything to do with it, of course the jury could not use it and at the present time I don't understand it.' "

It has been said that a reversal may not be had for the admission of purely irrelevant hearsay evidence, but petitioner urges that the admission of the Von Werra matter under circumstances of great moment tended to prejudice the jury.

The Von Werra matter was incompetent, irrelevant, and extraneous to the issue; it referred to an interned German flyer who had escaped from an internment camp in Canada. The testimony (R. 70-73) referred to a large sum of money and by implication served to impugn a motive to the defendant. The testimony by Krug was hearsay (R. 72). The District Attorney (R. 71) stated that the government would connect the Von Werra matter with further evidence. The matter was not connected up and the court did not strike the testimony. Petitioner avers that prejudicial error occurred in admitting the testimony and the failure of the court to strike it.

> "It is the right of the defendant accused of the crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence, admitted according to law and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw the jurors and grant a new trial." *United States v. Ogden, 105 Fed. 371; Mattox v. United States, 146 U. S. 140, 150; McKibben v. Philadelphia and Reading Railway Company, 251 Fed. 577.*

Petitioner urges that the testimony of Alvina Ludlow (R. 185-186) and Ethel Merrifield (R. 190-194) was incompetent, irrelevant, immaterial and obscene. Admission of this lewd and obscene testimony

> "only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged." *Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 392.* See also *Tootham v. United States, 203 Fed. 220.*

Petitioner avers that the lewd and obscene testimony (R. 185-186, 190-194) and the testimony of special agent Jack O. Parker (R. 201-208, 233) could not be rendered harmless, and reversible error cured by the court's general instructions directing the jury (R. 259-263) not to consider the evidence; because under these circumstances the government had already received the full benefit of the testimony, and the effect on the jury of inadmissible, prejudicial testimony, stricken too late, was carried with them and became a part of their deliberations, to the incurable prejudice of this petitioner.

When the court struck the testimony of Jack O. Parker (R. 259-263) the Honorable District Judge said:

> "I am not striking (R. 260) out the exhibits (Ex-

hibits 4, 9, 10, 12 and 13) (R. 366), the things found on the person of the defendant, I am letting all that stand. But it is the testimony given by the witness Jack O. Parker as to what the German soldier said."

This petitioner urges that all of these exhibits were erroneously admitted; that the introduction of a revolver and cartridges (Exhibits 12, 13) purchased by Krug in San Antonio, Texas, on May 31, 1942 (R. 96), six weeks after his departure from Detroit, was incompetent, irrelevant, immaterial and incurably prejudicial to the substantial rights of defendant, because it tended to mislead the jury and incite passion in their minds.

In *Todd v. United States* the Honorable Court said:

"But the legal presumption is that error produces prejudice. It is only when the fact so clearly appears to be beyond doubt that an error did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal can have effect."

"And this court is unable to determine from the record whether it was upon this inadmissible evidence, or upon other evidence in the record, that the jury based its verdict, and it cannot disregard the error." *Todd v. United States, 221 Fed. 209, 210* citing *Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653; Peck v. Heurich, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302; Railroad Company v. Holloway, 52 C. C. A. 260, 114 Fed. 458; Armour and Company v. Russell, 75 C. C. A. 416, 417, 144 Fed. 614, 615, 6 L. R. A. (N. S.) 662; Mutual Reserve Life Ins. Company v. Heidel, 161 Fed. 535, 539, 88 C. C. A. 447, 481.*

Petitioner avers that the trial court erred in permitting the introduction of Exhibits 12 (R. 203) and 13 (R. 204). These articles had no relation to the activities of Krug and the defendant in Detroit on April 18th and 19th, 1942. Petitioner submits further that the Greyhound Bus Map (Exhibit 9; R. 204) and the World Atlas (Exhibit 10; R. 204) were wholly incompetent, irrelevant and immaterial to the issue. The Greyhound map was gratuitously distributed by the Greyhound Bus Company to the public generally, available to any one at any time. The possession of these articles by Krug could in nowise pertain to the issue to prove an intent, or an overt act by defendant; their admission as evidence served only to cloud the issue and influence the jury to the incurable injury of the defendant's rights.

Petitioner urges that prejudice is presumed from the admission of all these exhibits and the testimony accompanying them and to substantiate the argument quote *Sprinkle v. United States:*

> "This is particularly true under the federal decisions applicable to the admission and exclusion of evidence, which are to the effect that it should be made to appear beyond a doubt that the improper evidence admitted did not and could not have prejudiced the rights of the party duly objecting." *Sprinkle v. United States, 150 U. S. 59,* citing therein *Deery v. Cray, 5 Wall. 795, 807, 18 L. Ed. 653; Gilmer v. Higley, 110 U. S. 47, 35 Sup. Ct. 471, 28 L. Ed. 62; Boston R. R. Company v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; United States v. Daubner (P. C.), 17 Fed. 793; Resurrection Gold Mining Company v. Fortune Gold Mining Company, 64 C. C. A. 180, 189, 129 Fed. 668; State v. Mikle, 81 N. C. 552; State v. Massey, 86 N. C.*

658, 41 Am. Rep. 478; State v. Jones, 93 N. C. 611; State v. Goodson, 107 N. C. 798, 12 S. E. 329; Bishop New Cr. Proc., Vol. 1, pages 89, 92, 93, also 1273, 1274, 1275, 1276, and cases cited.

Petitioner contends that Government Exhibit 17 (R. 222) should not have been admitted. The District Court erred in overruling the objection raised by trial counsel (R. 218) because the reading of the statement of the defendant (R. 222-226) could have misled the jury to the belief that the statement as read, was a confession; the trial court erred in not instructing the jury then and there (R. 219) that in order to convict on the charge of treason there must be a confession by the defendant in open court, as required by the Constitution, Art. 3, Sec. 3, Cl. 1, the trial attorney having brought it to the attention of the court (R. 219).

The Sixth Circuit Court of Appeals in affirming the instant case (decision Feb. 6, 1942, *Max Stephan v. United States, No. 9337, page 19)* said:

> "As indicated herein, on April 26, 1942, an officer of the Federal Bureau of Investigation took a written statement from appellant in the nature of a detrimental confession or admission, which statement was received in evidence late in the trial. It is nowhere claimed that the statement was not freely, voluntarily and understandingly made, but the proposition is pressed upon us that the court should have explained to the jury that it was not a 'confession in open court' [Constitution, Art. 3, Sec. 3, Cl. 1] upon which, standing alone, might be convicted. The contention is without weight, in view of the court's repeated emphasis in its instructions to the jury, that appellant could not be convicted except upon proof of intent, and proof that appellant

> did something to carry out that intent, that is to say, committed at least one overt act to be established by the testimony of two witnesses."

Petitioner in the brief filed in the Appellate Court [in *Max Stephan v. United States, No. 9337, p. 56*] in Argument VI, p. 56, said:

> "Pursuing the argument counsel submit that a statement in the nature of a confession to be admissible must be voluntary; that the statements should come from the defendant under such circumstances as shown them to be made of his own free will, with perfect knowledge of their nature and consequences, free from dictation, and without coercion, whether from fear of any threat of harm, promise or inducement by hope of reward, or method known as 'sweating.'
>
> "It is our contention that events occurring, from the time of defendant's detention to the signing of the statement, must have so agitated the mind of the defendant as to arouse his fear and to have a definitely coercive effect."

The admission of the statement by the trial court (R. 222) after overruling the objection (R. 219) was incurably prejudicial (R. 227-232).

Coupled with the testimony of special agent John Bugas of the Federal Bureau of Investigation together with the court's statement to the jury (R. 222) upon their return to the court,

> "*All I will tell the jury at the present time, for your information and all that I need to tell you is* that in your absence I have considered the *legal*

question as to the admissibility of Exhibit 17, which I will admit for the jury's consideration,"

the erroneously admitted statement had a strong tendency to prove defendant's guilt and this testimony and statement so (R. 227-232) prejudiced and inflamed the jury against the defendant as to prevent a fair and impartial trial. At no time later in the trial nor in the court's charge to the jury was the statement of petitioner referred to but was left for the jury's consideration as being legal, competent and relevant.

The court in the ***Fries case*** said:

> "I think that there ought to be great caution in receiving as evidence, a confession which any man makes himself, because it possibly might be obtained from him by artifice or intimidation." *United States v. Fries, 9 Fed. Cas. No. 5126, p. 914.*

Petitioner avers that it was error to admit the statement, because:

> "The evidence for the prosecution has consisted of the direct testimony of one witness to the alleged overt act, and of admissions made voluntarily by the accused party since his arrest. The Constitution provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The admissions here proved were not such confessions, and upon the trial of an indictment, would not, in connection with the testimony of a single witness to the overt act suffice to warrant a conviction. But the provision of the Constitution and the language of the first section of the Act of April 30, 1790, on the subject, apply only to the trial of indictments."
> * * *

"This appears to have been the opinion of Chief Justice Marshall (1 Burr Tr. 196) and likewise of my judicial predecessor in this district." [*Charge to the Grand Jury*], *(2 Wall. Jr. 138)*.

"The intention of the framers of the Constitution must have been to restrain the application of the prescribed rules of evidence to the trial of the indictment. A person should not, however, be indicted or imprisoned under a charge of treason when there is no rational probability that the charge, if true, can be proved by two witnesses on the future trial." *26 Fed. Cas. No. 15,262, p. 40.*

V.

The Court Should Have Compelled Witness Krug To Answer, Or Struck His Entire Testimony When Krug Repeatedly Refused To Answer Proper Questions On Cross-Examination.

Petitioner urges that it is one of the elementary principles of cross-examination that the party having the right to cross-examine, has the right to draw out from the witness, and lay before the jury anything tending, or which may tend to contradict, weaken, modify or explain the testimony given on direct examination, or which tends or may tend to elucidate the testimony or affect the credibility of the witness.

Krug, the Government's chief witness, had testified freely on direct examination (R. 52-81), and followed leading questions and testified at length giving the prosecution the full benefit of such testimony. But on cross-examination he became recalcitrant under questioning

and refused to answer proper questioning despite the court's ruling (R. 82, 83). Repeatedly during cross-examination (R. 81, 82, 84, 87, 97) Krug refused to answer questions that tended to explain testimony given on direct examination.

Krug had placed himself beyond the power of the court to punish him (R. 82, 83) and petitioner urges that it was error when the court, on its own motion, failed to strike Krug's entire testimony and disqualify him as a witness.

> "Q. (Interrupting): All right. I now will ask you again how much money you had in your possession when you arrived in Detroit on the 18th of April, 1942? A. I can't tell you this because it is a military secret, and has nothing to do with the case, as far as I see it.
>
> The Court: Well, witness—
>
> A. (Interposing): Your honor.
>
> The Court (continuing): —it is my duty to interpret whether or not it has anything to do with this case. That is a matter of law, you see. A. Yes.
>
> The Court: And I will say that it does have to do with it. It is a proper question. That is my duty to do that. So if you don't want to answer that—I don't see how that can be myself any military secret, and it is a proper question. That isn't an improper question at all. A. I am sorry. I can't answer this question, because I can't tell Canadian officials if it is possible or if it is not possible for a prisoner of war to get some money, and if I tell it I had a lot of money with me then they know that in any way I got some money into the prison camp, and if I tell no, I had no money with me, then they know too that there is no way that the prisoner gets some money. Do you understand what I mean? So I can't answer his question.

The Court: I don't see that it is a military secret myself. I don't see it. A. I can't answer his question.

The Court: But I do pass on the other that it is a proper question and a relevant question, relevant to the direct examination. I think I have gone as far as I can for you. I have got an answer that you can use.

Mr. Amberson: Well, I think, if your honor grants it, we should have a ruling here.

The Court: How?

Mr. Amberson: I think we should have a ruling here at this time whether this witness, having submitted himself voluntarily as a witness in this case, stands on any different footing than any other witness who refuses to answer a question when the court rules that it is a proper question.

The Court: Well, not as a matter of law, but from a practical standpoint as a prisoner of war he stands in a very different situation. It is much the same situation as I once had with two witnesses who were serving a life term in Jackson prison that were before me, and I just didn't know what I could do. If anybody can tell me, why, I welcome the information."

The witness' refusal to answer pertinent, proper questions, fully and most efficiently blocked the efforts of the trial counsel.

It was error when the court, on its own motion, failed to strike Krug's entire testimony and disqualify him as a witness.

> "Judicial power is that power vested in courts to enable them to administer justice according to law." *Adgins v. Ch. Hosp., 261 U. S. 525, 544.*

> "Where the witness after his examination in chief on the stand, has refused to submit to cross-examination, the opportunity of thus probing and testing his statements had substantially failed, and his direct testimony should be struck out. On the circumstances of the case the refusal or evasion of answers to one or more questions only need not lead to this result." *Wigmore on Evidence (3rd Ed.), pars. 1390, 1391.*

The Honorable Appellate Court in its decision affirming the conviction of petitioner (p. 31 of opinion), said:

> "The record leaves no doubt that Krug had no intention of testifying to anything which might prove detrimental to appellant. He was probably influenced to some extent by a representation made to him by someone in the interest of the appellant 'that I stayed and testified against Stephan.' That such a representation was made is uncontradicted and its occurrence is unexplained. The record fails to show when, or where, or particularly by whom it was made to Krug whether during the noon recess or at some other time. Krug had been on the witness stand before the recess and his recollection that someone had approached him took place after his return to the witness stand in the afternoon."

Petitioner respectfully submits that there is a misconception of the face of the record set out in the wording of the Honorable Appellate Court's decision (p. 31 of the opinion). The "representation" referred to supra was brought out during the cross-examination of Krug and on re-direct examination, and not made by contact outside of the court room. Krug was under heavy guard at all times during the trial. See testimony infra.

Krug testified at length during the examination in chief (R. 52-81), freely and fully under the direction of the

Assistant District Attorney. During the cross-examination (R. 81-111) the trial attorney (R. 109) asked witness Krug:

"Q. Will you state to the jury then what your purpose is in coming here as an enemy of this country and testifying in this case against a man who is charged with treason against our country? What is your purpose, your object? A. The purpose is to clear out that he didn't do what he is charged with. I was only asked to tell the truth about the case and what is wrong, what FBI has charged him and all the other persons who are charged with having known who I am.

Mr. Amberson: Will you read that answer again? I couldn't follow it, Mr. Reporter.

(Answer read.)

Q. In other words, witness, if I understand your answer correctly, you feel now as a witness here that the defendant, Max Stephan, did not do the things that he is charged with here with doing, is that correct?

Mr. Lehr: If the court please, I object to that, what he feels. It is a highly improper question.

Mr. Babcock: The question calls entirely for a conclusion on the part of the witness, a very important conclusion which the jury must draw.

Mr. Lehr: He himself has testified to the facts that are charged in the indictment.

The Court: It would be entirely proper for counsel to ask him as to his motive. It is always proper on cross-examination to show the motive. Now you get around to where you try to show that his motive was only an unfriendly motive. Now, whether I should permit him, on the theory of showing a motive, to tell what isn't true, on the interpretation that permits this witness to say whether or not he thinks the defendant is guilty of the thing charged against him, I don't believe I ought to do that. You have got a right to show this man's motive, and I ought to give you full ground to do it, and I intend to. I

think I have. But I will go farther, because you are entitled to do that with this witness, to show every motive he has. But, you see, this goes around and asks him, 'What do you think about this chap? Do you think he is guilty or not guilty?' is about what it amounts to.

Mr. Amberson: I will withdraw it.

The Court: All right. I think, in showing the motive of a witness who testified against him, I ought to do that, and I want to do that, but I don't want him to interpret our laws in this testimony on the facts.

Q. (By Mr. Amberson, continuing): You have never seen Max Stephan before today since you left here on the 19th of April? A. Since I left him on the 19th of April, yes.

Q. You have never seen him? A. No.

Q. Never talked with him? A. No. I asked for it if I should be allowed to talk to him, but I wasn't allowed to.

Q. He is no relative of yours? A. No."

On re-direct examination Krug (R. 114) states the answer to the appellate court's question: "The record fails to show when or where, or particularly, by whom it was made to Krug."

The following colloquy ensued between the court and the witness (R. 114):

"The Court: Now, who made the statement that you are talking about? A. I didn't understand.

The Court: Who made the statement that you are answering about? Who said this? A. I myself.

The Court: You said it? A. Yes.

The Court: Now, which was nearer to you, Donay or Stephan? A. Donay.

The Court: Donay. How much nearer? A. Let's see. Maybe three-quarters or half a yard.

The Court: All right. A. I can't measure. Your honor, would you be good enough to answer a question? You see, I don't know what he is called.

The Court: How is that? I don't understand you.
A. The defender of Mr. Stephan told me that I stayed and testified against Stephan. If that is so, I will be relieved from further questioning.
The Court: Will you read what he said?
(Answer read.)
A. Because it is not the intention—it is not my—I don't intend to testify against Stephan. I was told by the FBI agents that I have only to clear out the facts and to tell the truth and nothing but the truth.
The Court: That is what you are sworn to do, and that is as far as I have to do with it. I have nothing to do with whom the testimony helps or who it harms. My only desire is that people tell the truth. That is what you took your affirmation to do, not oath but affirmation, to tell the truth, and so that is what I say to you you should do is tell the truth.
You may go ahead.
A. Yes. I have another objection. I asked the FBI agents that I never can testify against a man who helped me, but they told me about when I made this question that there is no testifying against him but it is only in statement of the facts he already has told.
The Court: Well, you see, it isn't my job to decide who is being helped or who is being harmed by testimony. My job is to see, if I can, that witnesses tell the truth. So that is all that I say to you, is tell the truth.
Go ahead with your questioning."

Petitioner respectfully urges that reversible error occurred in not striking the entire testimony. Krug's failure to answer on cross-examination incurably prejudiced the substantial rights of petitioner and denied him a fair and impartial trial.

> "Cross-examination on matters in issue or directly relevant to the issue is a matter of right. Its exclusion is error." *5 Jones Commentaries on Evidence (1st Ed.) 842.*

VI.

Petitioner Contends That the Government Having Failed To Prove An Overt Act Of Treason and Failed To Produce Two Witnesses To Any Same Overt Act, Constituting a Fatal Variance Between the Indictment and Proof, the Court Erred In Not Directing a Verdict For the Defendant.

In the case under discussion there are no two witnesses to any overt act (if there were one) in the furtherance of the hostile designs of the enemy country. Failing in this essential of establishing that clear proof required as a prerequisite, the court should have directed a verdict of not guilty at the close of the government's proof.

> "Treason requires two such witnesses to the overt act. It has on this account been necessary to produce DIRECT and it is not enough to produce CIRCUMSTANTIAL proof." *United States v. Robinson, 259 Fed. 691.*

The case at bar is infinitely weaker than the one provoking these words:

> "It is the right of the people and the defendant * * * that the guilt of the defendant shall be submitted to the jury as the lawfully constituted tribunal to pass upon it. This of course does not lessen the responsibility of prosecuting officers * * * that no defendant shall be unjustly harrassed by unfounded charges, NOR DOES IT RELIEVE THE TRIAL JUDGE OF THE DUTY of unflinching pronouncing judgment that the evidence is insufficient to convict, if such be the case, and of seeing to it

> that no man be unjustly convicted, if entitled to an acquittal under the facts and the law." *United States v. Werner, 247 Fed. 711.*

The instant case has one important characteristic similar to the *Robinson case,* i. e., each have but one witness on whom the principal charges (if they were treasonable acts) solely depend; in that case a man named Victorica, and in this Krug. There the learned Hon. Learned Hand aptly says in granting a directed verdict:

> "I conclude therefore, that it is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits of the overt act together, but if so, each bit must have the support of two oaths." * * * "In the case of the overt acts at bar, was the necessary evidence produced. The gravamen of the charge depended for directed support on Victorcia alone. For the rest the case rested upon circumstantial evidence, which while well nigh conclusive, in fact, *was not direct as required.* There seems to me no question whatever, that without disregarding the whole theory of the constitution I could not allow a verdict to stand if I received it." *United States v. Robinson, 259 Fed. 691.*

If, therefore, the acts in the instant case could reach the dignity of acts of treason, the case at bar, being much the weaker, lacking many of the characteristics of the *Robinson case,* should end with a directed verdict of not guilty.

Petitioners contend that the motion for a directed verdict of not guilty made at the close of testimony should have been granted. No overt acts were proved and the Government could not rely on acts of Krug subsequent to his departure from Detroit. No testimony to

acts and declarations subsequent to overt acts charged can rank as evidence. This is well settled in law and as Chief Justice Marshall said:

> "On the trial for treason in levying war against the United States NO TESTIMONY RELATIVE TO THE CONDUCT OR DECLARATIONS OF THE PRISONER ELSEWHERE AND SUBSEQUENT TO THE OVERT ACT CHARGED, IS ADMISSIBLE, in the absence of proof of the overt act by two witnesses." *United States v. Burr (1807), F. Cas. No. 14693.*

Counsel contend that the weight of the evidence submitted at the trial of this petitioner, fell far short of supporting the verdict, and the following language could well have been adopted by the trial judge in making a disposition of the instant case:

> "The defendant, when placed on trial, was presumed to be innocent, and this presumption amounted to proof in his behalf, and could not be overcome until evidence was offered which was strong enough to satisfy the jury as to his guilt beyond a reasonable doubt, and the evidence being purely conjectural and speculative, I think it was the duty of the court to have instructed the jury that there was not sufficient legal evidence to justify them in returning a verdict of guilty, and that it should have directed a verdict of not guilty as to the defendant Angle." *Sprinkle v. United States, 150 Fed. 56, 63.*

A verdict should have been directed as moved by defendant.

VII.

The United States District Attorney, In His Closing Argument, Resorted To Intemperate, Improper Remarks, Repeatedly Referring To the Fact That No Witness Had Been Called By the Defense. The Contention Is That, By Resorting To Inference, Implication and Innuendo, Inciting Passion, the District Attorney's Remarks Constituted Palpably Incurable Error and a Mistrial Should Have Been Declared.

These being times of war when the passions and the feelings of the public runs high there is a greater duty on the court to guarantee to the defendant that fair trial the Constitution guarantees. When during the trial the district attorney makes unwarranted attacks on the defendant, all of which is calculated to arouse indignation in the jury; and by a continued tirade, arouses intense antagonism that is unwarranted, unnecessary and surely unconstitutional, such conduct warrants a reversal. This is especially true since the defendant, because of nationality, the war and the nature of the crime charged, was exceedingly unpopular.

It is only fitting and proper that all moral allowances be made for the excessive zeal and pride of success that compels the district attorney to obtain a conviction. Nevertheless, excesses which are carried too far are not allowable nor excusable, and from time immemorial our courts have bound themselves affirmatively to see that no injustice is done any accused by the improper course of a

prosecution, and when such officer does not keep within the legal bounds, a reversal is the only means to correct the wrong.

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Minker v. United States, 85 F. (2nd) 425. Judgment reversed.* Citing *Taliaferro v. United States, 47 F. (2nd) 699; Turk v. United States, 20 F. (2nd) 129; Sunderland v. United States, 99 F. (2nd) 202.*

The district attorney time and again asked the jurors to place themselves in the position of the defendant (R. 309-310). This is absolutely improper argument, for the duties of the jury is to listen to the testimony, the argument of counsel, the charge of the court, and when they retire for deliberation, to give the respondent the benefit of every reasonable doubt and not to place themselves in the position of using experiences of their own, or permitting their actions to be colored by their own feelings.

Time and again the district attorney made statements which were tended to mislead and did apparently mislead the jury. He said with definiteness and certainty (R. 303) that this is the kind of a case "where the death penalty would be absolutely unfair." This declaration on the part of the district attorney created an indelible impression that could not help but have tremendous weight in and guiding the jury in their verdict.

Times without number, statements were made that were untrue. When the district attorney attributes to Max Stephan all of the actions preceding the meeting of the war prisoner with the accused (R. 304), he knew he was absolutely wrong and he must have known it was improper argument, uttered only to inflame the jury into bringing in an improper verdict.

When he attributed friendship (R. 304) between the prisoner and the accused, he should have known that that was untrue, yet he persisted, with the deliberate intent and purpose to prejudice the jury.

When he referred to Lieutenant Krug giving a Nazi salute (R. 305), it refreshed the improper appearance of the lieutenant in his flier's uniform to the further prejudice of the accused's substantial rights.

> "To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense." *United States v. Nettl, 121 Fed. (2d) 927.*

It is a flagrant error to refer to the defendant's failure to take the stand (R. 305), and to say "Krug's statement stands on the record in this case, ladies and gentlemen of the jury, absolutely uncontradicted," from which statement the only inference that could be made was a reflection on the defendant for his failure to take the stand—he being the only one who could contradict Krug. The district attorney then said (R. 311):

> "This is Max's statement as introduced here. And to that Max made no comment."

He knew that the only person who could refute those statements was the defendant himself and calling attention to the fact that he did not take the stand, was incurable error and erroneously tended to prejudice the jury.

> "It is distinctly provided that a failure to testify should not create any presumption against the defendants." *McKnight v. United States, 115 Fed. 982.*

> "The fact that defendants did not see fit to take the stand and deny the charges made against them could not be allowed to raise in the minds of the jury any inference of guilt." *Mayer v. United States (C. C. A. Tenn. 1919), 259 F. 216.*

The statute U. S. C. A., Title 28, Ch. 17, Sec. 632 (Note 2) definitely precludes any such statement:

> "The provision in this section that the failure of defendant to exercise his privilege to become a witness 'shall not create a presumption against him' forbids all comment in the presence of the jury upon his omission to testify." *Williams v. United States (Ill. 1893), 13 S. Ct. 765, 149 U. S. 60, 37 L. Ed. 650; Reagan v. United States (Tex. 1895), 15 Sup. Ct. 610, 157 U. S. 301, 39 L. Ed. 709; McKnight v. United States (Ky. 1902), 115 F. 972, 54 C. C. A. 358; Green v. United States (C. C. A. Okla. 1920), 41 Sup. Ct. 449, 256 U. S. 689, 65 L. Ed. 1173.*

> "It is prejudicial error for the court or counsel to call to the attention of the jury in a criminal case in any manner, the right of the defendant, under the statute to testify in his own behalf * * *." See *McKnight v. United States (Ky. 1902), 115 F. 972.*

We think their one error alone is of such gravity that it compels a reversal of their case. This error is discussed exhaustively by the court in *Wilson v. United States, 149 U. S. 60, 13 Sup. Ct. 765 37 L. Ed. 650,* and in the state of Michigan by the case of *People v. Wessel, 256 Mich. 72.*

When the United States District Attorney made the statement (R. 316):

> "if these things Max Stephen had done for Krug had occurred before the 11th of last December, the time when Germany declared war on America, he would not be in here today, facing a charge of treason, because Krug at that time would not have been an enemy of the United States, because we were not at war,"

the district attorney well knew then, that Krug was a prisoner of war of Canada and therefore was not an enemy alien, for a prisoner of war becomes a political prisoner of the country where he is kept and ceases to be an enemy within the common meaning of the term:

> "Prisoners of war * * * shall be subject to the laws, regulations and orders in force in the army of the state into whose hands they have fallen." *American Journal of International Law, January, 1919, Vol. 13, page 98.*

The constantly repeated use of the words, "black-hearted traitor" (R. 306, 307), and "No, Max Stephan, you won't get away with it," and, repeated five times on one page (R. 269) of testimony incited the jury, and was so highly prejudicial that the wonder is not that they returned in eighty-five minutes but that they did not return in that many seconds.

In *Weathers v. United States, 117 F. (2d) 585,* the prosecuting attorney said someone had reached the witness and intimated she lied. The court said in reversing the trial judge:

> "The court did not reprimand the attorney for his line of argument nor direct the jury to disregard it. Moreover he did not comment upon it in his charge. The full force of this argument was left with the jury. * * * We are of the opinion that it was calculated to and did prejudice the rights of the defendant before the jury. It was the duty of the trial court to have promptly excluded this improper argument and directed the jury not to have considered it. Failing in this the court committed prejudicial error." *Berger Ward v. United States, 96 Fed. (2d) 189; Allen v. United States (9th Cir.), 115 F. 3; Maryland Casualty v. Reid, 76 F. (2d) 30.*

The district attorney's statement:

> "Well, if he (Amberson) knew anything about Lieutenant Krug or if he had that evidence to show that Lieutenant Krug was lying or was telling a falsehood on the stand, why in the name of Heaven didn't he bring some witnesses in here to contradict what Krug said,"

well knowing at the time of their utterance that the only person who could have refuted that statement was the defendant himself and it further exemplifies the deliberate attempt to point out the defendant's failure to take the stand in his own behalf.

When inflammatory remarks were repeatedly made to the jury in the following case the court said:

> "Indulgence was designed rather than inadvertent, and an improper purpose its only explanation. That

> it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so. * * * Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums, where neither bias nor prejudice rules and appeals to passion find no place though the government itself be then a litigant. *Pierce v. United States, 86 F. (2nd) 949.*

The most cursory reading of the closing argument of the district attorney will show such extreme subtlety and blasting accusations, each standing alone appearing apparently harmless, but uttered in a continuity of thought, with the aid of gesture, voice and attitude, made a picture before the jury most prejudicial.

> "While there is perhaps no single instance involving error so prejudicial as to warrant reversal, we are convinced that, considered as a whole, the rights of the defendant were so prejudicial thereby as to deprive him of that fair and impartial trial which the Constitution and the law of the land accords to every citizen accused of the commission of crime." *Neufield v. United States, 118 F. (2nd) 393.* Citing *Egan v. United States, 52 App. (D. C.) 384, 397, 287 F. 958, 971.*

Subtle suggestions, references and innuendoes of a prejudicial nature, which have no basis of fact, are sometimes fatal to a fair trial and cannot be sanctioned. *Towbin v. United States, 93 F. 2nd, 861.*

> "In the trial of an accused person he may, at his own request, and not otherwise, be a competent witness." *Act of March 16, 1878, 20 Stat. 30, 28 U. S. C. A., Sect. 362.*

The statute which grants this provision also provided as early as 1893 that:

> "His failure to make such request shall not create any presumption against him." *Wilson v. United States, 149 U. S. 60.*

And the Supreme Court interpreted the language in this case as follows:

> "To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it."

This principle has been applied in a number of later cases. (See *Note, 84 A. L. R. 784* and cases there cited) and its strict observance has been many times commended to prosecuting attorneys. In that case the district attorney used language which drew a comment from the court, by reason of which the following was said:

> "The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury and this defect should be corrected by setting the verdict aside and awarding a new trial." *Milton v. United States, 110 F. (2d) 556, 558.*

One of the leading cases outlining the status of a district attorney and his great responsibilities, reads:

> "The United States attorney * * * may prosecute with earnestness and vigor—indeed, he should do so—but, while he may strike hard blows, he is not at

> liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States, 295 U. S. 88, 89.*

It is urged here that the jury left the court room to enter upon their deliberations with the words of the United States District Attorney ringing in their ears:

> "NOW, I WANT YOU TO CARRY THAT WITH YOU WHEN YOU GO INTO YOUR JURY ROOM (R. 303), BECAUSE I CAN CONCEIVE OF A VERY AGGRAVATED CASE OF TREASON, WHERE A MAN WOULD DO SOMETHING THAT WOULD RESULT IN GREAT HARM AND INJURY AND DAMAGE TO HIS COUNTRY, WHERE ONLY THE DEATH PENALTY WOULD BE THE PROPER PENALTY TO BE INFLICTED AND THEN I CAN SEE OTHER CASES OF TREASON WHERE THE DAMAGE HAD NOT BEEN MUCH, BECAUSE IT WAS STOPPED IN TIME BEFORE IT WAS SUCCESSFULLY CARRIED OUT, **WHERE THE DEATH PENALTY WOULD BE ABSOLUTELY UNFAIR."**

These words uttered by the United States District Attorney, a highly important officer of the court, could not but lull the jurors into the feeling of false security that no matter what their verdict might be, no great and present danger confronted the accused; they were misled, as they might well have been, by the declaration that in such cases where the damage had not been great (because no real harm had been done to the United States), that the death penalty would not be inflicted. The statement of the learned counsel for the Government was indelibly impressed upon their minds, a fixation dominating their decision and their verdict to the incurable prejudice of the petitioner.

VIII.

Petitioner Urges That Harmful Error Occurred When the Court, In Its Charge, Failed To Definitely, Accurately and With Certainty Define An Overt Act Of Treason, and What Constitutes, "Adhering To, and Giving Aid and Comfort," To An Enemy Country In the Specific, Comprehensive Manner Made Mandatory By the Gravity Of the Crime Charged.

The crime of treason is of comparatively rare occurrence. With the exception of those well learned in history few people are aware of the elements necessary to complete the crime of treason, or have anything but the most vague idea of the legal definition of what constitutes a treasonable act against the United States.

Diligent search of the cases and careful study of the decisions fails to disclose a case where the elements of the crime of treason have been laid down in the degree that the elements of other crimes have been interpreted through a long line of legal interpretations and construction.

Treason is the most serious offense that may be committed against the United States, and its gravity is emphasized by the fact that it is the only crime defined by the Constitution. The Constitution defines treason as [Art. 3, Sec. 3, Cl. 1]: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." The statute upon which the indictment is based

(R. S., Sec. 5331; March 4, 1909, C. 321, Sec. 1, 35 Stat. 1088; U. S. C., Title 18, C. 1, Sec. 1) says:

> "Who ever owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort, within the United States or elsewhere, is guilty of treason."

It has remained for the courts to interpret what constitutes the "overt acts," and, from the cases reported, they have done so only with extreme caution and obvious reluctance to construct alleged acts of treason from high misdemeanors to the dignity of the high crime of treason. This is so in the *Burr Cases, 25 Fed. Cas. Nos. 14692, 14693; United States v. Griner, 26 Fed. Cas. No. 15262; 30 Fed. Cas. Nos. 18271, 18272; United States v. Fricke, 259 Fed. 673; United States v. Robinson, 259 Fed. 685.*

Petitioner respectfully submits that the jury could not of common knowledge be aware of any of the elements of the crime, regardless of an hundred facts placed before them in evidence, and unless they were clearly and comprehensively instructed by the court in its charge, they could not be expected to determine whether on the evidence treason had been committed by the defendant beyond a reasonable doubt, and apply the facts in reaching a proper verdict.

Petitioner is extremely reluctant to direct an assignment of error against the charge of the Honorable District Court in the instant case. The gravity of the sentence imposed and the extreme importance of this case to the people at large, compels petitioner to point out all errors fully.

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion

but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom." *Miller v. United States, 120 Fed. (2nd) 972.*

The Appellate Court in affirming this case said in its decision (p. 35 of the opinion):

> "Treason was exactly defined in the charge in accordance with both the Constitution and the statute, and the elements, 'overt act' and 'adhering to the enemy, giving them aid and comfort' were carefully set forth in accordance with applicable law."

The Appellate Court said that the elements of "overt act" and "adhering to the enemy, giving them aid and comfort" were carefully set forth in accordance with applicable law. Petitioner avers the total lack of interpretation of the meaning of the aforesaid terms in the line of cases decided, that it was incumbent upon the honorable trial court to have instructed more comprehensively in defining meanings of words.

Petitioner cites the following from the record to substantiate the charge of error. In the Charge (R. 332) the court said:

> "Now, I have told you in this way (R. 318-332) what the law is, and what the provisions are and what the charges are against the defendant, Max Stephan. In substance it is this. I think this is what constitutes the offense, is that at this time in question, on April 18 and April 19 of this very year, that we are at war with Germany. That is the charge that we are at war with Germany."

In defining "adhering to" the court said (R. 324):

> "As I say, illustrations are likely to mislead, but

> trying to find something similar where it says 'adhering' the thought came to me about the marriage ceremony that we hear the minister say, 'Forsaking all others and to her cling,' or something like that."

In constructing on intent (R. 334) the court said:

> "Intent is the meat of the crime, and it is the meat of this crime. And what is the intent? It is knowing that you are an American citizen, knowing that the United States is at war with Germany—if that is true, and those are facts for you. But I am telling you what would constitute the crime."

Again in speaking of "adhering to" (R. 335):

> "If one knows they are a citizen of the United States and they know that the United States is at war with Germany, they are charged with knowing that they owe their loyalty to the United States and that they do not owe it to the enemy. And if under those circumstances, knowing that they owe this loyalty to the United States, knowing that they should adhere to—'stick to' I guess is what it means, 'adhere' I don't know that sounds like sticking to. I know you should do that in time of war, stick to your own country, and give your aid and comfort to your own country and not to the enemy."

Every possible safeguard should have surrounded the trial to insure the impartial consideration of the facts, properly developed, and their bearing upon the question at issue been clearly understood by the jury. *Miller v. United States, 120 Fed. (2d) 972; Cook v. United States, 18 Fed. (2d) 50; Horwitz v. United States, 299 Fed. 449; Weare v. United States, 1 Fed. (2d) 617; Simon v. United States, 123 Fed. (2d) 80; United States v. B. Goedde & Company, 40 Fed. Supp. 523; Stakes v. United States, 264 Fed. 18.*

There were no exceptions to the court's charge. Petitioner respectfully urges that the charge (R. 318-341) was too long, and was interpolated by reference to matters wholly extraneous and in no wise related to a proper instruction to a jury on a trial for treason, and served only to confuse and mislead the jury as to the law on the facts and caused them to commence their deliberations without any clarity of thought as to the law, and while in a state of perplexity and confusion, pondered, to the prejudice of the defendant, constituting fatal error and denying defendant a fair and impartial trial.

Pertinent and lucid is *Boatright v. United States, 105 F. (2nd) 737*, where the court says:

> "In a criminal case in the Federal Court, the trial judge has the power to superintend and direct the trial, to review the evidence and to advise on the facts, but this power must not be abused * * *. The judge narrated material and important facts testified to by the government's witnesses and wove them into an argument that was clearly prejudicial. This we think requires a reversal." *Cook v. United States, 18 F. (2nd) 50; Stokes v. United States, 264 F. 18; Cline v. United States, 20 F. (2nd) 494; Hurwitz v. United States, 299 F. 449; Weare v. United States, 1 F. (2nd) 617.*

IX.

The Appellant Contends That Prejudicial Error Occurred When the Phrase, "A Secret Agent For, Spy For and Secret Representative Of Germany In the Furthering and Carrying On Of Its War Against the United States," Was Read From the Indictment By the Court In Its Charge, Although the Indictment Had Not Previously Been Read To the Jury On the Trial, Nor Had Any Testimony Been Adduced To Support That Allegation In the Indictment.

There is a specific duty imposed upon every Judge, sitting in a criminal case, to fulfil his obligation to the defendant. The moment a case starts, a mantle of protection covers the accused and:

> "the bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence, and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence, which has for its ultimate goal, the preservation and protection of the liberty, and freedom of the individual citizen." *Miller v. United States, 120 Fed. (2nd) 973.*

The indictment had not been read to the jury at any time during the trial. The court in its charge read the indictment in its entirety, and the jury for the first time heard the words in the indictment.

Counsel contends that the court read the words:

> "Max Stephan * * * did adhere to an enemy of the United States, to-wit, one Peter Krug, a subject

> of the government of Germany, * * * A SECRET AGENT FOR, SPY FOR, AND SECRET REPRESENTATIVE OF SAID GOVERNMENT OF GERMANY, in the furthering and carrying on of its war against the United States."

and that prejudicial error was committed.

At no time during the trial had the words been mentioned; they were not the subject of any proof, nor was any evidence offered to substantiate the allegation set out in the body of the indictment. No attempt was made to cure, explain or rule out the phrase. They stood alone, an incurably prejudicial group of words which, coming from the court in its charge, had all the force and dignity the jury under their oath were required to heed.

In a recent case the court read the grand jury's averments in an indictment, and in reversing that judgment it said that the averments in an indictment preceding charge of conspiracy, setting forth obnoxious conditions, held improper and prejudicial to the defendants as tending to prevent a fair, impartial trial by jury, and allowed the motion to quash stating:

> "Inasmuch as any interested party may read the indictment to the jury and it may properly be submitted to that body for consideration at the conclusion of trial, it is apparent that this statement of condition which 'should never be countenanced in a free society' and which naturally tends to inspire in all law abiding people, resentment and righteous outrage, will tend to destroy that ideal of American jurisprudence, a fair impartial trial, as guaranteed by the Constitution. Such a trial should be surrounded by every reasonable safeguard to insure the

absence of any improper influence operating on the minds of the jurors, and to give to their verdict, that dignity, impartiality and respect so essential to the maintenance of a correct administration of justice." *United States v. B. Goedde & Company, 40 F. Supp. 523,* citing *Ogden v. United States, 112 F. 523.*

The designation of proof, here brought before the jury for the first time, was highly inflammatory and had no basis in any proofs whatsoever. In fact the proofs established its falsiity. It should have been stricken from the indictment, and its being read to the jury constitutes prejudice.

X.

The Jury Not Sequestered, But Permitted To Separate During the Entire Trial, Were Influenced To the Detriment Of the Defendant.

Error is claimed because the jury each noon separated and were liberated each day for the night to return the following day. They were continually exposed to hostile public sentiment, detailed daily newspaper accounts and radio comments, and were not protected from outside influences, thus becoming incurably prejudiced precluding any possibility of a fair trial.

At the outset of the case, the jury when finally selected were photographed and the names, addresses and such other information about each as to constitute a positive identification, was given.

In every edition the newspapers carried the proceedings of that day, and in typical newspaper manner, embelished with editorial comment, those accounts. Throughout each evening, when the jurors were free, radio broadcasts commented upon the then most important of all trials.

The Appellate Court's opinion on this phase of the claimed error said

> "there is nothing to indicate that the appellant was in the least prejudiced by the separation of the jury." [See p. 20 decision.]

Does the court attribute to this jury special qualities not found in other people? Is it assumed that by some unknown trait, they unlike any other people, would not look in the paper at their own pictures, would not read the accounts of the case that they listened to and would turn the radio dial when the commentator started to speak about the very subject matter they were an important part of that day? Or if they did not, can to them be attributed the quality of permanently erasing from their minds the impressions and influences reaching them?

The answer is contained in *Stone v. United States, 113 F. (2d) 70*, where this very court (6th Cir. Ct. of App.) in reversing the lower court, said:

> "There is no right more sacred than the right to a fair trial. There is no wrong more grievous than its negation."

> "Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained."

"Any course is clearly illegal which would expose them to the danger of influence outside the court. If a single juror is improperly influenced, the verdict is as unfair as if all were. The presumption is always in favor of good character but the law concerning juries provided strictly that all jurors be secluded from outside influences and presumes that such influence may act upon some of them, and may act so as to go beyond detection."

"The whole jury was exposed to, and actually encountered an outside influence."

The petitioner's opinion on this phase of the alleged error is admirably expressed by the Hon. Judge Acheson in the famous *Hat Trimmings case, Meyer et al. v. Cadwalader (C. C.), 49 Fed. 32,* wherein the facts strikingly similar to the case at bar said:

"It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it." Cited in *Griffin v. United States, 295 Fed. 439.*

The Hon. J. B. McPherson, District Judge, said in his Comments of the *Meyer v. Cadwalader (supra) case:*

"There, articles not unlike in tone to the article now under consideration appeared in several newspapers of general circulation published in Philadel-

phia; and, although there was no proof that these newspapers had been read by the jurors, Judge Acheson declared it to be incredible that they had not been read, and upon this assumption decided without hesitation that an improper influence had thus been brought to bear to obtain a verdict."

"Under our system of jurisprudence, at least, cases are tried upon evidence that is carefully scrutinized, and not upon insinuation and hearsay; and it is an attack upon the prisoner's constitutional rights to influence the jurors."

"A new trial is granted in each case." *United States v. Ogden, 105 Fed. 371."*

"It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial. *United States v. Ogden (D. C.), 105 Fed. 371; Mattox v. United States, 146 U. S. 140, 150, 13 Sup. Ct. 50, 36 L. Ed. 917; McKibben v. Philadelphia & Reading Railway Company, 251 Fed. 577, 163 C. C. A. 571."*

The courts have held that it was not necessary for the jury to read any articles but quite sufficient to sustain a reversal if merely exposed to the improper influence.

A "fraud order" was published prominently in Cincinnati papers and so presumably came to jury's attention,

"* * * this was an unfortunate coincidence, and the occurrence of it was beyond the control of the trial judge; but it was of itself sufficient to make impossible that fair trial to which every respondent is entitled." *Harrison v. United States, 200 Fed. 669.*

The courts have zealously guarded the right of a fair trial by jury and new cases are added daily to that long line of affirming decisions maintaining the purity of our juries and their protection from any possible outside influence. The courts have gone so far as to rule that even counsel cannot waive or acquiesce in the waiver of that right of the defendant.

Petitioner respectfully avers that the defendant in the circumstances surrounding the instant case when tried, could not have that fair trial which was his "sacred right."

XI.

Petitioner Avers the Sentence Is So Severe and Oppressive As To Be Wholly Disproportionate To the Offense and Obviously So Unreasonable That It Violates the Substantial Rights Of the Defendant.

Counsel do not aver that a sentence of death is cruel and excessive punishment. There are numerous crimes set out in the statutes, the extreme penalty of which is death, and though the penalty is extreme, it is in some cases warranted and justified by the circumstances.

In too many cases the extreme penalty is grossly disproportionate to the offense committed and where the penalty is so severe and oppressive, and obviously unreasonable, it must be said to violate due process.

A crime that warrants a death penalty, is one that has the color, display, or action of hostility. Such an

act as would show a wanton disregard of the consequences, a wilful, deliberate contemplated scheme of acts set in motion, with a careless unconcern of the result, irrespective whom those results hurt, maim or kill. Any set of circumstances that starts a series of acts in which there is an utter disregard of human life, that is not only shocking but revolting to the human conscience, should be made punishable with the extreme penalty.

At times the death penalty is so manifestly repugnant to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally.

When a court of justice awards punishment for a breach of the law the object is not vengeance, but is intended to serve as a deterrent to the repetition of crime.

What did Max Stephan do to justify the cruel and excessive punishment meted out by the sentencing judge? Every act attributed to him was an act of benevolence (R. 62, 75, 76, 168, 225), a series of kindly acts, without the slightest trace of rancor, hatred, hostility or wanton disregard of the results. On the contrary, the acts were manifestly prompted by a desire and the intent to help an unfortunate individual who had refused to "go back where he came from," who had related stories of conditions from whence he had come, stories that impelled the heart of Max Stephan to help a boy in distress, and he fed, clothed and entertained that "runaway boy" without the intent or motive to do a wrongful act.

The measure of petitioner's intent is in the nature of the acts that he did, each, and all of them the very essence of personal aid, and not treasonable.

Using the recorded acts, as a "measuring stick," had the defendant in this cause been sentenced for harboring an alien enemy, even then a long incarceration as punishment would be unreasonable in fitting the punishment to the crime. Comparing these acts of Max Stephan; were they treasonable?

To punish treason with either death or imprisonment lies wholly within the discretion of the court, but,

> "the provision of the Federal Constitution prohibiting cruel and unusual punishment is addressed to the courts of the United States having criminal jurisdiction and is a limitation on their discretion." *Ex Parte Watkins, 7 Peters (U. S.) 568, 8 L. Ed. 786.*

The court went far beyond and outside of the record in pronouncing sentence (R. 346-362), indicating that after verdict had been rendered, the court had permitted reports on defendant's acts *(dehors record)* previous to, and subsequent to his naturalization as an American citizen to color his deliberations, pending judgment and sentence.

Counsel for petitioner reluctantly and cautiously direct themselves to this question, but they are under compulsion to respectfully contend the defendant was tried for committing overt acts of treason; that the evidence adduced on the trial could not, and did not support the overt acts of treason; that no acts of the defendant previous to (R. 347-353), nor subsequent to the overt acts charged were admissible as evidence nor could they be entertained by the honorable judge in the exercise of the discretion granted the courts to determine the sentence in a capital case. *(25 Fed. Cas. Nos. 14,692, 14,693; 1 Burr. Tr. 196; United States v. Fries, 9 Fed. Cas. No. 5126, page 914;*

United States v. Bollman, 8 U. S. 75; Logan v. United States, 144 U. S. 309; Sprinkle v. United States, 159 U. S. 59 (citing cases); United States v. Fricke, 259 Fed. 673; United States v. Robinson, 259 Fed. 691; United States v. Schaefer ,251 U. S. 482.)

The rules that grant courts the right to confer with probation officers, previous to passing sentence, could not be extended to representatives and reports of the Federal Bureau of Investigation (R. 346) as was done in the instant case.

The court's mind must be free from the color of extraneous matters. In weighing the facts in the case it is the duty of the judge in a capital case to confine his reasoning to the issues in the case and not inflict punishment for crimes and misdemeanors, as in the instant case, wholly unrelated to the overt acts of treason.

> "Anciently, when under the barbarous doctrine of an eye for an eye, and a tooth for a tooth, 'punishment' was deemed to be, as the word implies, largely compensatory, the natural and logical conception of a sentence for a crime was that the 'punishment' should be nicely graduated to the nature and circumstances of the offense. * * * The modern conception of 'punishment' however, and the one that, so far as we can ascertain, has always obtained in this state, takes practically no account of compensation. * * * Obviously, then, the office of a judicial sentence, for crime, cannot, under this conception of 'punishment' be altogether the same as when society demanded payment, complete and more or less in kind, for infractions of its laws. No longer is proportionate punishment to be meted out to the criminal, measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state, as a sort of penetential ward." * * * *42 LRANS 978; Ann. Cas. 1914A, 1248.*

"Hatred and revenge enter largely into punishment among barbarians and savages; but among civilized people, punishment is only inflicted for the purpose of protecting society, and not for revenge. In other words the law never seeks a victim, but only seeks to reform the offender and set an example which will deter others from committing similar offenses, and by both of these means it seeks to protect society." *16 C. J. 1351 f. n. 46.*

Counsel contend that a fair trial was impossible, that the verdict violated his constitutional rights, that the sentence was disproportionate to the offense, cruel and excessive and that the death penalty should be set aside.

RELIEF SOUGHT.

Because of the foregoing prejudicial errors, it is respectfully submitted that the writ prayed for should be issued.

Respectfully submitted,

NICHOLAS SALOWICH,
JAMES E. McCABE,
Petitioners.

NICHOLAS SALOWICH,
JAMES E. McCABE,
Attorneys for Petitioner.

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CITATIONS

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Cases—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 792

MAX STEPHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (2 R. 14–37) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 6, 1943 (2 R. 14). The petition for a writ of certiorari was filed March 5, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment properly charged that the defendant had committed treason; and, if so, whether the evidence was legally sufficient to support the verdict.

2. Whether there was any error in connection with the testimony of the German officer Krug, either by reason of his alleged incompetency as a witness, or by reason of his conduct in the courtroom, or by reason of his refusal to answer certain questions.

3. Whether there was prejudicial error in the admission of various items of evidence, asserted to be irrelevant, incompetent, or obscene.[1]

4. Whether there was any impropriety in the United States Attorney's closing argument to the jury.

---

[1] Those items of evidence were as follows:

(a) The so-called Von Werra matter, which consisted of a conversation between the German officer Krug and one Donay in the presence of the defendant, with respect to a German aviator, Von Werra, who had apparently been released on bail and who had escaped to Germany.

(b) The testimony of witnesses Ludlow and Merrifield with respect to the defendant's efforts in procuring the services of the prostitute Merrifield on behalf of Krug.

(c) The testimony of the Federal agent Parker with respect to Krug's apprehension at San Antonio, Texas, and the introduction as exhibits of various articles, such as a pistol, cartridges, etc., in the possession of Krug at the time of his arrest.

(d) A signed statement made by the defendant at the time of his arrest.

5. Whether the judge's charge to the jury defined the crime and the nature of the requisite proof with sufficient clarity and precision.

6. Whether, in the circumstances of this case, the jury should have been sequestered.

7. Whether the death sentence is so disproportionate to the offense as to deprive the defendant of any rights.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution, Article III:

> SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.
>
> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

United States Code, Title 18:

> *Section 1. (Criminal Code, section 1.) Treason.* Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason. (R. S. § 5331; Act of Mar. 4, 1909, c. 321, § 1, 35 Stat. 1088.)

Section 2. (*Criminal Code, section 2.*) *Same; punishment.* Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than $10,000, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall, moreover, be incapable of holding any office under the United States. (R. S. § 5332; Act of Mar. 4, 1909, c. 321, § 2, 35 Stat. 1088.)

STATEMENT

Petitioner was found guilty under an indictment charging him with treason (1 R. 342), and he was sentenced to death by hanging (1 R. 25–26, 362). The Circuit Court of Appeals affirmed the judgment (2 R. 14).

The indictment.—The indictment was in one count. It alleged that the defendant, a citizen of the United States, in violation of his duty of allegiance to the United States, wilfully and treasonably adhered to Peter Krug, a member of the German armed forces who had escaped from a military war prisoner's camp in Canada, giving him aid and comfort in the city of Detroit, Michigan, on April 18 and 19, 1942; that such aid and comfort consisted in receiving and treating

with Krug, in furnishing hospitality to him, in obtaining money, necessities of life, and personal effects for him, in concealing his identity, and in arranging for his transportation in and about Detroit and from Detroit to Chicago. The indictment further charged that in adhering to Krug, giving him aid and comfort, as aforesaid, the defendant wilfully and treasonably performed twelve enumerated overt acts [2] (R. 1 R. 1–5).

The evidence.—The principal witness for the Government was Peter Krug (1 R. 52–116), an officer in the German air force. In August 1940, Krug was in command of a bomber flying over England and was shot down (1 R. 52). He was captured, hospitalized, and sent to a prison camp in Canada (1 R. 52–53). In April 1942 he escaped (1 R. 53, 117). During the course of that escape he appeared, at nine o'clock in the morning of Saturday, April 18, 1942, at the doorway of the witness Margareta Bertelmann, in Detroit (1 R. 55, 166). She was a native and citizen of Germany (1 R. 175). She had sent food and clothing to German prisoners in Canada and in so doing had been required to write her name and address on those packages (1 R. 174–175). To her Krug immediately revealed his identity

[2] The overt acts are numbered from 1 through 13, but there is no overt act 6. Moreover, after the evidence had been submitted, the District Court ordered that overt act 10 be stricken (1 R. 10, 246–257, 261–263). Thus, at the time the case was submitted to the jury, there were eleven overt acts alleged in the indictment.

(1 R. 55, 166–167). Conscious of guilt in harboring him, she became apprehensive (1 R. 167, 182–184), and telephoned for the defendant Stephan, her friend (1 R. 167). Shortly after she had reached him on the telephone, Stephan arrived at her home (1 R. 58, 167).

Stephan was a native of Germany, admitted to citizenship of the United States on June 24, 1935 (1 R. 49–50; Ex. 1–C). He owned a restaurant in Detroit. Until the declaration of war by Germany against the United States, Mrs. Bertelmann frequented that place with other women who met there to knit clothing for German prisoners. (1 R. 174.)

To Stephan, too, Krug admitted his identity and that he had escaped (1 R. 58–59, 168). Stephan told him to "give up", that he did not have "a chance" (1 R. 168). Krug insisted that he had to make an effort (1 R. 168). He felt that he had to inform the German Government about conditions at the Canadian camp, and he wanted to get back to Germany to do his "duty again" (1 R. 64–65, 101, 168).

At Stephan's suggestion, Mrs. Bertelmann gave Krug underwear, socks, and shoes (1 R. 60, 169); Stephan asked her for money and she put twenty dollars on her kitchen table (1 R. 169, 170). There is some uncertainty as to whether she or Stephan gave that money to Krug but no doubt that Krug got the money (1 R. 60, 169–170, 285–

286). On leaving Mrs. Bertelmann, Stephan escorted Krug to his car which was parked outside of her house (1 R. 61, 171). Then Stephan took Krug to his restaurant and as they left the car Stephan told Krug to turn the corner and enter through the front door. Stephan entered through the rear. Their meeting would have seemed fortuitous to anyone inside. (1 R. 61–62.) Krug entered, sat down at a table, and Stephan provided him with a meal (1 R. 62).

Stephan then said that he was busy, and Krug took a walk, returning in mid-afternoon (1 R. 62). Stephan gave Krug a tie and a wallet, and they took a trip about Detroit together during the remainder of the afternoon (1 R. 63–64). Stephan bought a light travelling bag and gave it to Krug (1 R. 66).

They went to a restaurant, Haller's Cafe, and there the two had whisky and beer (1 R. 66, 128). The proprietor, Haller, told Stephan that he was reluctant to serve Krug; he thought he was not of age. Stephan told Haller that Krug was one of the "Meyers boys" and he knew he was of age. (1 R. 129.) Stephan paid for the drinks (1 R. 130, 67). Another incident fixed the occurrence in Haller's memory. Stephan and his guest had two bags with them when they entered. They forgot them at Haller's bar when they left. But a few minutes later the "Meyers boy," as Haller called Krug in his testimony, returned and took them (1 R. 130, 67).

During the afternoon Stephan called on the witness Lenz, from whom he regularly bought crockery (1 R. 126, 65). He asked Lenz to call the railroad station and inquire about train departures to Chicago. Lenz learned that the only train that afternoon left at four o'clock. (1 R. 127.) When Stephan rejoined Krug he told him that he could not reach the station in time for that train (1 R. 224).

Later in the afternoon both men went to another restaurant, referred to as the Progressive Hall, or the Progressive Club. (1 R. 67, 122–124).

Later, Stephan took Krug to the place of business of his friend Theodore Donay, a Detroit merchant. Donay was informed that Krug was the escaped German flyer. (1 R. 68–69, 195.) There was talk about another German soldier, Von Werra, who had escaped and had returned to Germany (1 R. 70–73). Donay gave him twenty dollars (1 R. 69, 196–197, 286).

Some time during the afternoon Stephan took Krug to a house on Duffield Street in Detroit where Krug testified he "saw" a "woman" (1 R. 67). Two witnesses, Mrs. Ludlow and Mrs. Merrifield, testified to their presence there (1 R. 185, 190–191). On cross-examination of these women by petitioner's counsel it was brought out that one of them procured the other to submit to sexual intercourse with Krug (1 R. 186–190, 191–193). On his own motion the trial judge struck their

testimony from the record, and admonished the jury to disregard it (1 R. 261–262).

In the early evening of April 18, Stephan brought Krug back to his own restaurant where Krug was served dinner (1 R. 73, 154). While Krug was sitting at the table, Mr. and Mrs. Erhardt, customers known by name to Stephan, came in and talked with him about the payment of a bill (1 R. 151, 138, 142, 73). Stephan led them to Krug's table and introduced Krug as a friend from Milwaukee (1 R. 74, 138, 142–143). As soon as Krug finished eating, the waitress, Erna Schwartz, beckoned him to follow her into the back room (1 R. 145, 74, 92). She pointed to the entrance to the Field Hotel, accessible and visible from the rear door of Stephan's place (1 R. 152). Stephan had said to her that Krug should stay there that night rather than occupy a spare room in her home (1 R. 151, 158).

Krug registered under the alias Miller or Müller (1 R. 75, 133–134). Severel hours later, after eleven o'clock that night, Emmerich, the clerk, by chance saw Stephan, and told him he had "half a hunch" that a German flyer had registered at his hotel. Emmerich indicated that Stephan made a noncommittal response. (1 R. 134.)

At eight o'clock the next morning, Sunday, April 19, and by prearrangement between them, Krug appeared at Stephan's door (1 R. 75). Stephan drove him downtown where they had breakfast together, for which Stephan paid (1 R. 75–76).

They then went to the bus station, and Stephan bought Krug a ticket to Chicago (1 R. 76; but cf. 226).

At midnight Stephan was interviewed by agents of the Federal Bureau of Investigation.[3] In a statement which he signed at that time, he admitted his knowledge of Krug's identity, and his help to Krug. (1 R. 217, 218, 222–226.)

Federal officers arrested Krug at San Antonio, Texas, on May 1, 1942 (1 R. 202).

The issues submitted to the jury.—All the witnesses in the case were presented by the Government. The defense contented itself with cross-examining the Government's witnesses; it produced no witnesses itself and offered no evidence. And in the argument of defendant's counsel to the jury it was conceded that the defendant had done the various acts charged, but it was urged that he was not guilty because those acts were simply intended to help a German aviator, as an individual, and were not motivated by any purpose to aid the German Reich.[4]

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[3] See footnote 13, *infra*, p. 27.

[4] Defendant's counsel stated (1 R. 285–286):

"There is only one argument in this case, there is only one question, only one issue. What is it?

"Did this respondent, Max Stephan, when he did these things which he is charged with doing and the things which we admit that he did, was he actuated by an evil, a malicious intent to subvert the Government of our country and to aid and comfort the enemy and to adhere to the enemy?

"Did he have that evil intent? * * *

* * * * *

"The acts themselves are admitted. Whether they were overt or not is not a matter for admission. It is for you to

The issue was thus sharply drawn as to whether, from the objective facts which were not disputed, the jury could draw the inference of the forbidden purpose to aid Germany. That issue was exhaustively explored in the opposing summations, and the charge to the jury made it unmistakably clear that such an intent must be found (1 R. 332–337). Thus, in addition to the question whether there were two or more witnesses to at least one overt act, and in addition to the various formal issues (such as the citizenship of Stephan), the crucial question presented to the jury was the existence of the requisite intent. Counsel for the defendant expressly stated that he had no exception to the charge (1 R. 341).

ARGUMENT

Treason is the only crime defined by the Constitution, and is the most serious offense that can be committed against the United States. Accordingly, this case is obviously one of importance

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determine whether or not there were two or more witnesses to any one or more of these overt acts. That is for you, and it is not for me to argue, but in every one of these charges in this indictment, the paragraph winds up, 'adhering to and rendering aid and comfort to the enemy, Peter Krug.'

"It is my contention, and we have asked the court to so charge you that it is the law, before you have any right to find Max Stephan guilty of this monstrous crime with which he is charged, you must find he possessed the evil and the wicked intent, not to aid only Peter Krug, but to aid the enemy of this country of ours, the German Reich, or the state of Germany, or whatever you call it."

in the sense that it involves a crime of such magnitude. Nevertheless, we submit that the decision below is correct and that the mere gravity of the offense should not require further review.

I

Petitioner contends that the overt acts alleged and proved do not "constitute the crime of treason by adhering to, giving aid and comfort to an enemy country" (Pet. 37–41) and that under the allegations and proof he is guilty of nothing more than "giving aid and comfort for the sole benefit of an individual" (Pet. 42–43).

Petitioner's argument, we submit, is predicated upon an erroneous concept o fthe essential elements of the crime of treason. It is clear that the crime is made out when, as here, the Government has established (1) that the defendant owed allegiance to the United States;[5] (2) the enemy character of the person aided and comforted;[6]

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[5] This element of the crime is implicit in the constitutional provisions (*United States* v. *Wiltberger*, 5 Wheat. 76, 97), and is explicitly required by 18 U. S. C. 1. In the present case the indictment alleged "* * * Max Stephan * * * then and there being a citizen of the United States and a person owing allegiance to the United States" (1 R. 1), and the proof showed he was admitted to citizenship on June 24, 1935 (1 R. 49; Ex. 1-C).

[6] This element of the crime is stated in Art. III, sec. 3, cl. 1 of the Constitution, and in 18 U. S. C. 1, which speak of adhering "to their [of the United States] enemies, giving them aid and comfort." And it has been ruled that "On the

(3) a wilful intent to commit acts calculated to strengthen the enemy or weaken the nation to which allegiance is owed;[7] and (4) "the testimony of two witnesses to the same overt act."[8] The overt act, in and of itself does not necessarily, as petitioner assumes, constitute the crime of

breaking out of a war between two nations, the citizens or subjects of the respective belligerents are deemed, by the law of nations, to be enemies of each other." *Charge to Grand Jury—Treason*, 30 Fed. Cas. (No. 18,271) 1034, 1035 (C. C. S. D. N. Y.), per Mr. Justice Nelson; *United States* v. *Greathouse*, 26 Fed. Cas. (No. 15254) 18, 22 (C. C. N. D. Cal.) per Mr. Justice Field; *United States* v. *Fricke*, 259 Fed. 673, 675 *et seq.* (S. D. N. Y.), per Mayer, D. J. The enemy character of Peter Krug was plainly alleged in the indictment (1 R. 1–2) and shown by the proof (1 R. 52, 53, 57, 117, 168).

[7] Though not explicitly set forth in either the constitutional or statutory provision, it has generally been held that an essential element of the crime of treason is an intent to give aid and comfort to the enemy. *United States* v. *Werner*, 247 Fed. 708, 709 (E. D. Pa.); *United States* v. *Fricke*, 259 Fed. 673, 676 (S. D. N. Y.); cf. *United States* v. *Burr*, 25 Fed. Cas. (No. 14692h) 52, 54 (C. C. D. Va. 1807); *United States* v. *Burr*, 25 Fed. Cas. (No. 14693) 55, 90 (C. C. D. Va.). See *United States* v. *Robinson*, 259 Fed. 685, 690 (S. D. N. Y.). See also Warren, *What Is Giving Aid and Comfort to the Enemy?*, 1918, 27 Yale L. J. 331, 343–345.

[8] Constitution, Art. III, sec. 3, cl. 1.

Petitioner asserts categorically that the Government "failed to produce two witnesses to any same overt act" (Pet. 71–73). As the court below held, however, at least several of the overt acts alleged were proved by two witnesses. Both Krug and Mrs. Bertelmann testified to Stephan's escorting Krug from Mrs. Bertelmann's house to his car. (1 R. 61, 171; overt act 3.) Again, Haller and

treason; if it did, the prosecution would be required to prove the entire offense by two witnesses, which is obviously more than the Constitution requires.

Moreover, the overt act, standing by itself, may appear to be wholly innocent. See *United States* v. *Fricke*, 259 Fed. 673, 677 (S. D. N. Y.). Thus, the dispatch of a letter to the enemy containing secret military information, or the shipment of supplies intended for the enemy would certainly constitute treason. Yet, the principal overt act in each instance, the mailing of the letter or the delivery of packages to a common carrier, is plainly one that has no outward appearances of treason. Only the intention and surrounding circumstances, not apparent to the naked eye, render the act one of treason. And the intent may be proved by any relevant evidence.[9]

Krug testified to the incident at Haller's place, where Stephan concealed Krug's identity (1 R. 66, 128; overt act 7). Mr. and Mrs. Erhardt proved that he concealed Krug's identity at his own restaurant that evening by referring to him as a friend from Milwaukee (1 R. 74, 139, 142–143; overt act 11). Petitioner does not challenge the holding of the court below that the "failure to establish all of the overt acts alleged is not fatal upon a motion for peremptory instructions" (2 R. 21), and makes no contention that the situation differs after verdict.

[9] See *Case of Fries*, 9 Fed. Cas. (No. 5,126) 826, 909, 914, 916 (C. C. D. Pa.); *Trial of David Maclane*, 26 How. St. Trials 721, 797–798; *Halsbury's Laws of England*, 2d ed. Vol. VI, p. 424. Thus the intent may be inferred from

Petitioner's principal authority for his contention that the overt act itself must "constitute the crime" is a dictum in *United States* v. *Robinson*, 259 Fed. 685, 690 (S. D. N. Y.), where doubt was expressed whether an overt act was sufficient if it did not "openly manifest any treason." The dictum was based upon an excerpt from the unreported charge of Lord Reading in the trial of Sir Roger Casement;[10] but it appears from the charge as a whole that Lord Reading was merely enunciating the familiar rule that the overt act in a treason case must be a constituent part of the

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statements antecedent, *United States* v. *Greathouse*, *supra*, pp. 24, 26; *Trial of Sir William Parkyns*, 13 How. St. Trials 63, 117–118, or contemporaneous with or subsequent to the overt act. *Respublica* v. *Roberts*, 1 Dall. 39, 40; *Trial of Ambrose Rookwood*, 13 How. St. Trials 139, 213-221. It may be proved by a confession, *United States* v. *Lee*, 26 Fed. Cas. (No. 15,584) 907 (C. C. D. C.); *Trial of Francis Willis*, 15 How. St. Trials 614, 623–625. It may be deduced from proof of knowledge which accompanied the commission of the overt act or by proof of conduct, i. e., other overt acts, which, while not alleged in the indictment, serve to illuminate the intent which may have accompanied the commission of the overt act specified in the indictment, *Respublica* v. *Carlisle*, 1 Dall, 34, 37; *Trial of Sir John Wedderburn*, 18 How. St. Trials 426, 427; *Trial of Sir Richard Grahme*, 12 How. St. Trials 645, 727–729, 740; *The Trials of the Regicides*, 5 How. St. Trials 947, 976–977.

[10] The charge is not set forth in the official report *The King* v. *Casement*, 1 K. B. [1917] 98, but may be found in "*Trial of Roger Casement*," published by William Hodge & Company, 1917, pp. 183–185. The opinions in the official report deal primarily with the question whether treason can be committed by acts perpetrated beyond the realm.

effort to help the enemy."[11] There is nothing in the charge that precludes the ascertainment of the guilty intent from evidence outside the overt act.

It is submitted, therefore, that once an overt act is established which in itself betokens assistance, it is for the jury to say from all the evidence whether it was done with treasonous intent. The overt act need not itself prove intent. That can be supplied by other factors, such as defendant's knowledge of the enemy's status and plans, or by his confession, or by other conduct, not recited in the indictment as an overt act, but which nevertheless illuminate the intent which accompanied the overt act. Measured by this rule, there would seem to be no question as to the sufficiency of the overt acts alleged and proved here by two witnesses (see footnote 8, *supra*, p. 13); for they showed that petitioner deliberately concealed

[11] See *Charge to Grand Jury—Treason*, 30 Fed. Cas. (No. 18,272) 1036, 1037 (C. C. S. D. Ohio); *United States* v. *Greathouse*, 26 Fed. Cas. (No. 15,254) 18, 24 (C. C. N. D. Calif.); *Charge to Grand Jury—Treason*, 30 Fed. Cas. (No. 18,271) 1034, 1035 (C. C. S. D. N. Y.); *Trial of David Maclane*, 26 How. St. Trials 721, 794–795; *Blackstone's Commentaries on the Laws of England*, Thomas M. Cooley's second edition (1872), Book IV, ch. 6, p. 345; *United States* v. *Pryor*, 27 Fed. Cas. (No. 16,096) 628, 630 (C. C. D. Pa.); *Proceedings against William Gregg*, 14 How. St. Trials 1371, 1376; *Charge to Grand Jury—Treason and Piracy*, 30 Fed. Cas. (No. 18,277) 1049 (C. C. D. Mass.); *Charge to Grand Jury—Treason*, 30 Fed. Cas. (No. 18,270) 1032, 1033 (C. C. S. D. N. Y.); *United States* v. *Lee*, 26 Fed. Cas. (No. 15,584) 907, 908 (C. C. D. C.).

Krug's identity and gave him assistance so as to facilitate his escape and prevent its discovery.

There is no merit to petitioner's contention that the indictment fails to allege and the proof does not show anything more than that he gave aid and comfort to Krug as "an individual" and that his conduct was "devoid of the color of aid and comfort to the enemy country" (Pet. 42–43). Since Krug's status as an enemy was indisputably established (see n. 6, p. 12, *supra*), it was obviously for the jury to determine whether petitioner's conduct was intended as personal benevolence [12] without breach of national allegiance or whether it was intended to strengthen "the enemies of the United States in the conduct of a war against the United States." *United States* v. *Fricke,* 259 Fed. 673, 676 (S. D. N. Y. 1919). Opposed to petitioner's claim that he had no intent to help Germany (cf. 1 R. 287–293), the jury had before it not only Krug's testimony that

[12] Aid and comfort have been regarded as including the rendition of all types of assistance, from the obvious help of joining the enemy's forces or releasing prisoners of war or furnishing materials of war or information valuable to the conduct of the war to the more ambiguous act of engaging in commerce. *Charge to Grand Jury—Treason,* 30 Fed. Cas. (No. 18,270) 1032, 1034 (C. C. S. D. N. Y.); *Hanauer* v. *Doane,* 12 Wall. 342, 347; *Carlisle* v. *United States,* 16 Wall. 147, 150–151; *Young* v. *United States,* 97 U. S. 39, 63–64; *Sprott* v. *United States,* 20 Wall. 459, 463; East, *Pleas of the Crown* (1803), pp. 77–81; *United States* v. *Hodges,* 26 Fed. Cas. (No. 15,374) 332, 334 (C. C. D. Md.); *Charge to Grand Jury—Treason,* 30 Fed. Cas. (No. 18,272) 1036, 1037 (C. C. S. D. Ohio).

he told Stephan of his plans but also Stephan's admissions that he knew of those plans (1 R. 224, 228). The indictment charged that in giving aid to Krug, Stephan performed the specified overt acts "unlawfully, feloniously, wilfully, traitorously, treasonably, knowingly, and with intent to adhere to and give aid and comfort to the said Peter Krug." (1 R. 3.) The trial court instructed the jury that intent was a necessary element of the crime (1 R. 333, 334, 335, 336, 337, 339, 340), and that if the jury believed that petitioner had no intent to help Germany, it must acquit (1 R. 336–337). By its verdict it must now be presumed that the jury believed otherwise.

II

1. *Krug's competency as a witness.*—Petitioner contends the trial court erred in permitting Krug to testify. He asserts that Krug was incompetent (a) because he was an "infamous" person and (b) because he was an acknowledged felon. (Pet. 43–54.) Both of these contentions are without merit.

(a) Petitioner's argument is predicated on the false assumption that, within the meaning of the common law rules of competency, infamous is the equivalent of detestable, or hated, or abhorrent. At common law a proffered witness was incompetent if he had been convicted of treason, a felony, or an offense *crimen falsi,* i. e., a crime involving fraud or one that is obstructive of

justice through falsehood or fraud. Wigmore, *Evidence* (3d ed. 1940), Vol. 2, sec. 520; cf. *United States* v. *Sims,* 161 Fed. 1008, 1012 (C. C. N. D. Ala.); *Peace* v. *United States,* 278 Fed. 180 (C. C. A. 7); *Pakas* v. *United States,* 240 Fed. 350, 354 (C. C. A. 2); *Maxey* v. *United States,* 207 Fed. 327, 331–332 (C. C. A. 8). But there is nothing to indicate that a prisoner of war, because of that status, is an infamous person, and the rules of international law which require that honorable treatment be accorded him would indicate the contrary.

Furthermore, petitioner's argument that as a Nazi, Krug could have no scruple against perjuring himself in an American court, is not founded on anything in this record. His testimony, both on direct and cross-examination, give every indication that he was telling the truth.

(b) Petitioner's argument that Krug was incompetent as a witness because he was a felon, since he admitted that in connection with his escape he had prepared two fictitious letters of identification and in the course of his escape he had appropriated a rowboat, is likewise groundless. Assuming, *arguendo,* that Krug's admissions constituted a confession of the felonies of forgery and larceny, it is settled that "It is *the judgment,* and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify." Wigmore, *op. cit. supra,* sec. 521. Finally, even if Krug had been convicted of a

felony, this Court held in *Rosen* v. *United States*, 245 U. S. 467, that the common law rule which rendered a felon incompetent as a witness was no longer applicable to the trials of criminal cases in the federal courts. Cf. *Funk* v. *United States*, 290 U. S. 371.

2. *Krug's attire and conduct in the courtroom.*—Petitioner contends (Pet. 10, 55) that it was error to permit Krug to testify because he was attired in a German Army uniform and because he gave the Nazi salute. Apart from a bare mention of Krug's attire in the summations to the jury at the end of the trial (1 R. 294, 305), the record contains no evidence of Krug's uniform or alleged salute, and no objection was made at any time in that regard. Moreover, since Krug was then a prisoner of war in the custody of Canadian officials, there is nothing to show that he was not required by them to wear the uniform as distinctive clothing to impede further escape. Nor is there any suggestion that Krug was "dressed up" for the occasion. And it is at least questionable whether the Nazi salute was any more prejudicial than the answers which petitioner's counsel extracted from him on cross-examination to the effect that he was an enemy of this country and of those present in the courtroom (1 R. 109).

3. *Krug's refusal to answer certain questions.*—Petitioner contends (Pet. 11, 64) that Krug's testimony should have been stricken in its entirety because of his refusal to answer certain questions

put to him on cross-examination. The specific questions which Krug declined to answer on cross-examination, on the ground that they involved military secrets, are quoted in the opinion of the Circuit Court of Appeals (2 R. 27–28) and were concerned with how much money he had when he arrived in Detroit (1 R. 81), and how much money he had when he left Detroit (1 R. 84), where he first landed in Detroit after his escape from Canada (1 R. 87), how he was then dressed (1 R. 95), how much money he had when he arrived at San Antonio (1 R. 97), and the identity of his battalion or squadron in the German Army (1 R. 98). He also refused to reveal the address originally set forth on a certain piece of paper (1 R. 105). He had declined on direct and redirect examination to answer similar questions. (1 R. 76.)

Krug was a prisoner of war, schooled in the tradition that as such an effort at escape was a privilege and obligation (1 R. 86–87). He would not reveal any circumstance affecting his escape unless he was confident that the information sought by the question was already in the possession of the Canadian or American authorities (1 R. 84, 85, 82–83). He would not have testified to the help he received at the hands of the petitioner had he not learned before he came to court that the facts were already known (1 R. 114).

In these circumstances, we submit, Krug's testimony was properly submitted to the jury. The

authorities cited by petitioner (Pet. 66, 67, 70) suggest no departure from the rule that a witness's refusal to answer isolated questions will not require striking his testimony it its entirety except on a showing that the refusal prevented a fair opportunity to search the veracity of the witness' narrative. See Wigmore, *Evidence* (3d ed. 1940), Vol. V, sec. 1391, p. 112; *Jansson* v. *Larsson,* 30 App. D. C. 203; *Lew Choy* v. *Jim Sing,* 125 Wash. 631; *Gibson* v. *Goldthwaite,* 7 Ala. 281. Except for the broad assertion that Krug's refusal to answer "most efficiently blocked the efforts of the trial counsel" (Pet 66), petitioner makes no such showing. Furthermore, the record is clear that the defense was afforded a complete opportunity to test Krug's veracity. His testimony contains all the indicia of truthfulness. It cannot be read without the conclusion that this witness, who had a better than average capacity to observe accurately and report his observation from memory with equal accuracy, earnestly tried throughout his examination to tell the truth. The situation is not one in which a witness refuses to answer a question because of fear that the answer would reveal inconsistencies in his narrative. Nor did the refusal to answer block in any substantial way any material avenue of inquiry into the honesty of his story. Thus, the defense was not deprived of an opportunity to dispute the proof that Stephan concealed Krug's identity to the Erhardts or to Haller, by

Krug's refusal, based on claim of military privilege, to say how much money he had when he arrived at or left Detroit, or when he was arrested at San Antonio. Moreover, that petitioner was not "incurably prejudiced" as he now claims (Pet. 70), is apparent from the fact that his counsel conceded that petitioner had helped Krug in the way Krug described (1 R. 285–286).

III

Petitioner contends that he was deprived of a fair trial in consequence of the admission of several items of testimony which, it is asserted, were incompetent and prejudicial (Pet. 12–13, 56–64).

1. *The testimony relating to Von Werra.*—Krug was permitted to testify about a conversation that he had with Theodore Donay in the presence of the petitioner, relating to another German aviator, Von Werra, who had been captured, released on bail, and who escaped to Germany. Although this testimony was rather garbled it did serve as a foundation to corroborate the testimony of Rintelen, Donay's clerk, who overheard snatches of the conversation, and whose testimony was offered in connection with overt act 9 (1 R. 4, 67–69, 195–196).

2. *The so-called obscene testimony.*—Petitioner next complains of the testimony of the witnesses Ludlow and Merrifield who were called by the prosecution to show that during the course of the afternoon of April 18th, Stephan and Krug were

present together at a house on Duffield Street (1 R. 185–186, 190–191). That testimony was directed towards overt act 10, which was later stricken (1 R. 10, 261–262). Such "obscenity" as was disclosed in this connection was brought out only by the cross-examination of these witnesses and Krug by petitioner's counsel (1 R. 85–86, 186–190, 191–193.) Moreover, the trial judge struck the testimony of these two witnesses from the record and admonished the jury to give it no consideration whatsoever (1 R. 261–262).

3. *The testimony of agent Parker and the introduction of exhibits.*—The witness Parker was a special agent of the Federal Bureau of Investigation, who had been stationed at San Antonio, Texas, and had participated in the apprehension of Krug. He testified as to Krug's conversation with him, in which Krug acknowledged that he had been with Stephan in Detroit (1 R. 201–208). There were also introduced in evidence various articles which had been found in Krug's possession at the time of his arrest; these included a bus map, a revolver and cartridges, a necktie, wallet, a small bag, and a mutilated piece of paper bearing an address in Guatemala (1 R. 204–205, 198–201).

It is true that some of Parker's testimony consisted of hearsay, but regardless of whether such hearsay was admissible, there was no possibility of prejudice to the defendant: the trial judge struck it from the record, admonishing the jury

to disregard it (1 R. 258–260), and the defendant's counsel conceded to the jury that Stephan had rendered Krug the kind of assistance that Krug told Parker he had received (1 R. 285–286). Similarly, with respect to the exhibits, Stephan's counsel appeared to waive all objection; in addressing the jury he said (1 R. 285): "Now, certain exhibits have been introduced here. Those are all admitted. There is no argument about that."

4. *The admission of Stephan's signed statement.*—Finally, petitioner urges (Pet. 13, 61–64), that the trial court should have excluded Government Exhibit 17 (R. 222–226), a statement made by him to agents of the Federal Bureau of Investigation ~~following~~ about the time of his arrest and in which he recited the details of his relations with Krug. Petitioner contends only that "the reading of the statement * * * could have misled the jury to the belief that the statement as read, was a confession" and that the trial court should have "then and there" instructed the jury "that in order to convict on the charge of treason there must be a confession by the defendant in open court" (Pet 61). The statement was clearly admissible, however, as proof of petitioner's intent (*Respublica* v. *Roberts,* 1 Dall. 39, 40; *United States* v. *Lee,* 26 Fed. Cas. (No. 15,584) 907, 908 (C. C. D. C.); *Trial of Francis Willis,* 15 How. St. Trials 614, 623–625; *Case of Fries,* 9 Fed. Cas. (No. 5,126) 826, 909, 914 (C. C. D. Pa.), and the jury

was told as clearly as language could convey, that there could be no conviction except on proof of an overt act by two witnesses (1 R. 326, 327, 337, 339, 340, 341).

At the trial, petitioner objected to the introduction of his statement on two grounds: (1) insofar as it had not been shown that he was the same Max Stephan who had been naturalized in 1935, the corpus delicti had not yet been proved (1 R. 219–221), and (2) insofar as the statement was but a memorandum of a conversation, "it is not the best evidence" (1 R. 221–222). The trial court overruled both objections (*idem*), and they are not renewed here. In his brief in the Circuit Court of Appeals, petitioner suggested that the "events occurring, from the time of defendant's detention to the signing of the statement, must have so agitated the mind of the defendant as to arouse his fear and to have a definitely coercive effect" (Pet. 62). In the absence of any more specific showing, there can be no question as to the voluntary character of the statement, and we do not understand that petitioner urges the point here. Nor is any contention made that the statement should have been excluded on the ground that it was obtained while petitioner was held in illegal custody under the rule of *McNabb* v. *United States,* No. 25, this Term, decided March 1, 1943.[13]

[13] There is an intimation in the prosecutor's summation (1 R. 310) that petitioner was arrested on Sunday, April 19,

IV

Petitioner advances a variety of objections to the prosecutor's final summation which, he contends, "constituted palpably incurable error" (Pet. 74–82). We think that only three of those contentions call for discussion.

1. *The alleged statements of the prosecutor suggesting that the defendant had not taken the*

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at midnight. The facts are more fully revealed in the transcript of the formal hearing held on April 27 (1 R. 228) before Commissioner Hurd on a charge of harboring an alien within the country, upon which charge, the Department's files show, petitioner had been arraigned on April 20. For the Court's information, we have lodged a copy of this transcript with the Clerk. Bugas, agent in charge of the Detroit office of the Federal Bureau of Investigation, there testified when cross-examined by petitioner's trial counsel, that he interviewed petitioner at his restaurant around midnight on April 19. Petitioner then accompanied Bugas to his office where the interview continued and where Stephan dictated the statement. The dictation and transcription were completed by 1:30 a. m., or within one and one-half hours after Bugas first saw Stephan (Tr. pp. 41, 42). We are also informed that petitioner was not taken into custody until after he had made the statement, and the arraignment on the charge of harboring an alien occurred at 4 p. m. that day. After further investigation the present indictment was returned on June 17, and petitioner was arraigned for treason on June 20. (1 R. v.) Petitioner signed the statement, initialed each page, made a slight correction in it (1 R. 217, 218)) and at no time has he repudiated its contents. The statement is a straightforward, factual account and contains no conclusory matter. So far as acknowledgment of facts can ever occur simultaneously with apprehension, it happened here, and in view of the spontaneity of petitioner's admission, we do not believe that any of the problems presented by *McNabb* v. *United States* are involved here.

stand.—It is asserted that the prosecutor erred in suggesting that the defendant had failed to testify in his own behalf (Pet. 79). The record shows that in his plea to the jury, petitioner's counsel attacked Krug as unworthy of belief (1 R. 294–295) and suggested that it was somewhat offensive to him to see a German prisoner of war treated with courtesy in a United States district court (1 R. 283–284). In response, and in his own turn, the prosecutor asked why it was that if defense counsel knew that Krug was not telling the truth he had not called witnesses to dispute his testimony. These remarks were immediately objected to by the defense and they elicited an immediate ruling of the trial judge who told the jury not to consider this part of the prosecution argument (1 R. 304–305). As the trial court indicated at the time (*id.*), it seems clear that the prosecutor's remarks were provoked by defense counsel's argument (cf. *Crumpton* v. *United States,* 138 U. S. 361, 363–364), but even if that were not the case, it is settled that for the prosecutor to assert that testimony is uncontradicted is not the equivalent of comment on the failure of a defendant to testify in his own behalf. *Lefkowitz* v. *United States,* 273 Fed. 664, 667–668 (C. C. A. 2), certiorari denied, 257 U. S. 637; *Bradley* v. *United States,* 254 Fed. 289, 291 (C. C. A. 8); *Carlisle* v. *United States,* 194 Fed. 827, 830 (C. C. A. 4); *Robilio* v. *United States,* 291 Fed. 975, 985 (C. C. A. 6), certiorari denied, 263 U. S. 716;

Jamail v. *United States,* 55 F. (2d) 216, 217 (C. C. A. 5); *Lias* v. *United States,* 51 F. (2d) 215, 217–218 (C. C. A. 4), affirmed, 284 U. S. 584. Moreover, even if the prosecutor had trespassed against the rule, the immediate admonition from the trial judge to the jury would have cured the impropriety. *Brooks* v. *United States,* 8 F. (2d) 593, 595 (C. C. A. 9); *Cross* v. *United States,* 68 F. (2d) 366 (C. C. A. 5); *Morgan* v. *United States,* 31 F. (2d) 385, 388 (C. C. A. 7), certiorari denied, 280 U. S. 556; *Wright* v. *United States,* 108 Fed. 805, 812–813 (C. C. A. 5), certiorari denied, 181 U. S. 620; *United States* v. *DeVasto,* 52 F. (2d) 26, 30 (C. C. A. 2), certiorari denied, 284 U. S. 678; *Baker* v. *United States,* 115 F. (2d) 533, 544 (C. C. A. 8), certiorari denied, 312 U. S. 692.

Petitioner also complains (Pet. 76) of the prosecutor's statement that Krug's testimony was not only uncontradicted but was corroborated by witnesses who were friends and associates of the defendant (1 R. 305). Petitioner made no objection to the statement in the trial court (cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 238–239; *Johnson* v. *United States,* No. 273, this Term, decided February 15, 1943), but even if he had, it is settled that comment on the defendant's failure to produce witnesses is not the equivalent of comment on the failure of the defendant to testify. *Jackson* v. *United States,* 102 Fed.

473, 487 (C. C. A. 9); *Rinella* v. *United States*, 60 F. (2d) 216, 218 (C. C. A. 7); *Gargotta* v. *United States*, 77 F. (2d) 977, 978 (C. C. A. 8); *Rice* v. *United States*, 35 F. (2d) 689, 694–695 (C. C. A. 2), certiorari denied, 281 U. S. 730.

Finally, petitioner asserts (Pet. 76), the statement "to that Max made no comment" was a further effort to prejudice the jury by telling them that Stephan had not taken the stand. The record shows, however, that the excerpt taken from the prosecutor's closing argument was torn out of context, and that when considered in its proper setting, there was no suggestion whatever that Stephan had failed to take the stand. The United States Attorney was discussing Stephan's conversation with the hotel clerk Emmerich, who had testified that he told Stephan he had "half a hunch" that a German soldier had registered at the hotel. This conversation was corroborated in Stephan's own statement, where he said (1 R. 225) "To this I didn't make any comment." Taken in context, the prosecutor was simply using Stephan's own words (1 R. 311) with respect to Stephan's conversation with Emmerich. There was not the slightest suggestion pertaining to the defendant's failure to testify at the trial.

2. *The so-called inflammatory languge used by the prosecutor.*—There is complaint (Pet. 78) of the denunciatory phrase "black-hearted traitor." The Circuit Court of Appeals thought the adjective "unfortunate" (2 R. 34). The phrase was

"material to the philosophy" of the crime charged (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239), since it did no more than idiomatically characterize the offense for which petitioner was on trial. While the prosecutor may have struck a "hard blow," it was not a "foul" one (*Berger* v. *United States*, 295 U. S. 78, 88; *Viereck* v. *United States*, No. 458, this Term, decided March 1, 1943). The language used came well within permissible limits. *Di Carlo* v. *United States*, 6 F. (2d) 364, 368 (C. C. A. 2). Petitioner also stresses other language employed by the prosecutor (Pet. 16, 17, 78), which was even less objectionable.

3. *The prosecutor's reference to the death penalty.*—Lastly, petitioner complains (Pet 82) that the Government's summation carried the promise to the jury that conviction would not be followed by the imposition of a penalty of death. No such assurance can be fairly inferred from the United States Attorney's statement taken as a whole. To be sure, he did say that not all acts of treason should be punished by death (1 R. 303). The statement was made immediately after the prosecutor's reference to the fact that before being sworn as jurors they professed no prejudice against the imposition of capital punishment (1 R. 303). And it was followed also by his reminder that the question of the degree of punishment was for the judge and was not their concern (1 R. 303). The charge contains the

same admonition (1 R. 341). In that state of the record, and in the absence of any exception to his remark, there was no error in the comment. Cf. *United States* v. *Socony-Vacuum Oil Co., supra,* at p. 239; *Petrilli* v. *United States,* 129 F. (2d) 101, 104 (C. C. A. 8), certiorari denied, October 12, 1942, No. 277 this Term.

V

The Circuit Court of Appeals correctly disposed (2 R. 35) of petitioner's contention (Pet. 83–87), that the charge did not adequately define the crime of treason.

The correctness and sufficiency of the charge, its accuracy in defining the crime, and its intelligibility must be determined by viewing it in its entirety. It is not necessary that the charge be composed of nicely grammatical and well-balanced sentences. The test is whether the jury understood what the judge said. And it may well be that the very homeliness of his language, more clearly than not, conveyed his meaning. He coupled his reading of the indictment with the warning that it was only a charge and proved nothing (1 R. 319, 327).[14] Certainly he defined

[14] Hence there is no merit to petitioner's contention (Pet. 88–90) that the court erred in reading the entire indictment to the jury because it contained an unproved allegation that Krug was a German "spy." Cf. *Petrilli* v. *United States*, 129 F. (2d) 101, 103–104 (C. C. A. 8), certiorari denied, October 12, 1942, No. 277, this Term.

treason within the meaning of the Constitution and the statute (1 R. 320–326). He cautioned the jury that it could not convict except on proof of an overt act testified to by two witnesses (1 R. 326, 339, 340). He gave the requested instruction, to which the defendant was probably not entitled (*Carlisle* v. *United States,* 16 Wall. 147, 154–155; *Trial of David Maclane,* 26 How. St. Trials 721), that proof of citizenship was a condition precedent to conviction (1 R. 323–325, 326, 340). He told the jury that treason could only be committed during war (1 R. 325) and that in any event it could not convict unless it had been proved, beyond a reasonable doubt, that petitioner intended to commit the crime of treason by intending to aid Germany (1 R. 332–335, 336–337, 338, 339, 340). The defendant had interposed no defense, apart from his argument that his conduct showed no more than human kindliness to Krug, that it was not conduct inspired by a motive or desire to help Germany through Krug. The jury was told that if it believed that argument, it had to acquit. The charge was clear and fair.

Moreover, the trial judge granted every instruction requested by the defendant, either in *ipsissimis verbis* or with modifications that were not objected to (1 R. 16–18), and defendant's counsel unambiguously informed the judge that he had no exception to the court's charge (1 R. 341).

VI

Petitioner's argument (Pet. 90–94) that he was prejudiced by the failure of the trial judge to sequester the jury is without merit. The trial judge offered to sequester the jury and made the offer beyond the jury's hearing so that had either side desired the jury sequestered the jurors would not have known the origin of the request which might have resulted in personal hardship to them. However, both the United States Attorney and counsel for the defendant informed the court that neither of them desired sequestration of the jury (2 R. 6). The trial judge thereafter plainly admonished the jurors that they were not to discuss the case with anyone (2 R. 7–9). Nor is this a case in which the petitioner was damaged in consequence of a tactical error by trial counsel. Such might have been the case if there were any showing that the jury was exposed to improper influence and that the opportunity for such exposure arose from his counsel's consent or request that the jury be permitted to separate during the trial. There is nothing in this record to indicate that the verdict returned reflected the jury's consideration of anything except competent proof adduced in the courtroom. In these circumstances, the Circuit Court of Appeals correctly held that there was no error in permitting the

jury to separate. *Holt* v. *United States,* 218 U. S. 245, 251; *Brown* v. *United States,* 99 F. (2d) 131, 132 (App. D. C.).

VII

Petitioner contends (Pet. 94–98) that the sentence of death was "so severe and oppressive as to be wholly disproportionate to the offense and obviously so unreasonable that it violates the substantial rights of the defendant."

Petitioner's assertion that the judgment imposes a punishment so severe that "it must be said to violate due process" (Pet. 94), is unsound since treason is the most serious crime against the United States, and since death is a statutory punishment for the crime. Cf. *Jackson* v. *United States,* 102 Fed. 473, 487 (C. C. A. 9); *Tincher* v. *United States,* 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Bailey* v. *United States,* 74 F. (2d) 451, 452–453 (C. C. A. 10). And since the sentence is within the statutory limits, an appellate court is without jurisdiction to revise it. Cf. *Ex Parte Watkins,* 7 Pet. 567, 574.

Moreover, it cannot be said that the trial court abused its discretion in the imposition of sentence. Pursuant to established practice and accepted procedure, the judge caused a pre-sentence investigation to be made (1 R. 344, 346–347; 2 R. 37). From this investigation the judge was impressed by the fact that Stephan had maintained "a haven, harbor and meeting place for

Nazi sympathizers" (1 R. 353); that the likelihood that the aid and comfort which he extended to Krug was part of a carefully executed plot to assist Krug's escape (1 R. 357–358) and that petitioner had admitted to the court, after his conviction, "every one of the overt acts and all of the actual facts charged against him" (1 R. 358). The court said (*id.*): "From his admissions alone no intelligent person could draw any conclusion except that he is a traitor to the United States, that he loves Germany, and that all that he did for Krug was done for the purpose of aiding Germany and helping Germany and the Axis win the war against the Allies." In the circumstances, the judge was satisfied that he was required to impose the maximum sentence because it was the only sentence which would serve as adequate warning to all other potential traitors (1 R. 360–361).

CONCLUSION

The petitioner presented no evidence; he simply contended that the acts done were motivated by a desire to help Krug as an individual and were not intended as assistance to Germany. The issue was thus sharply drawn as to the nature of his intent, and the jury was carefully and repeatedly instructed by the court that the mere intention to assist an individual was not sufficient. It must be presumed that the jury found the requisite intent. Moreover, at least several of the overt

acts were proved by two witnesses. Although the offense is one of extreme gravity, it is apparent from this record that the defendant was properly convicted in a fair trial. The mere seriousness of the crime does not require further review, and the Court would be fully justified in denying certiorari.

Respectfully submitted.

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MARCH 1943.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 792

MAX STEPHAN
Petitioner,

v.

THE UNITED STATES OF AMERICA.

On Petition For Writ Of Certiorari To the United States Circuit Court Of Appeals For the Sixth Circuit.

PETITION FOR REHEARING

And Motion for Continuance of Order for Stay of Execution of Judgment.

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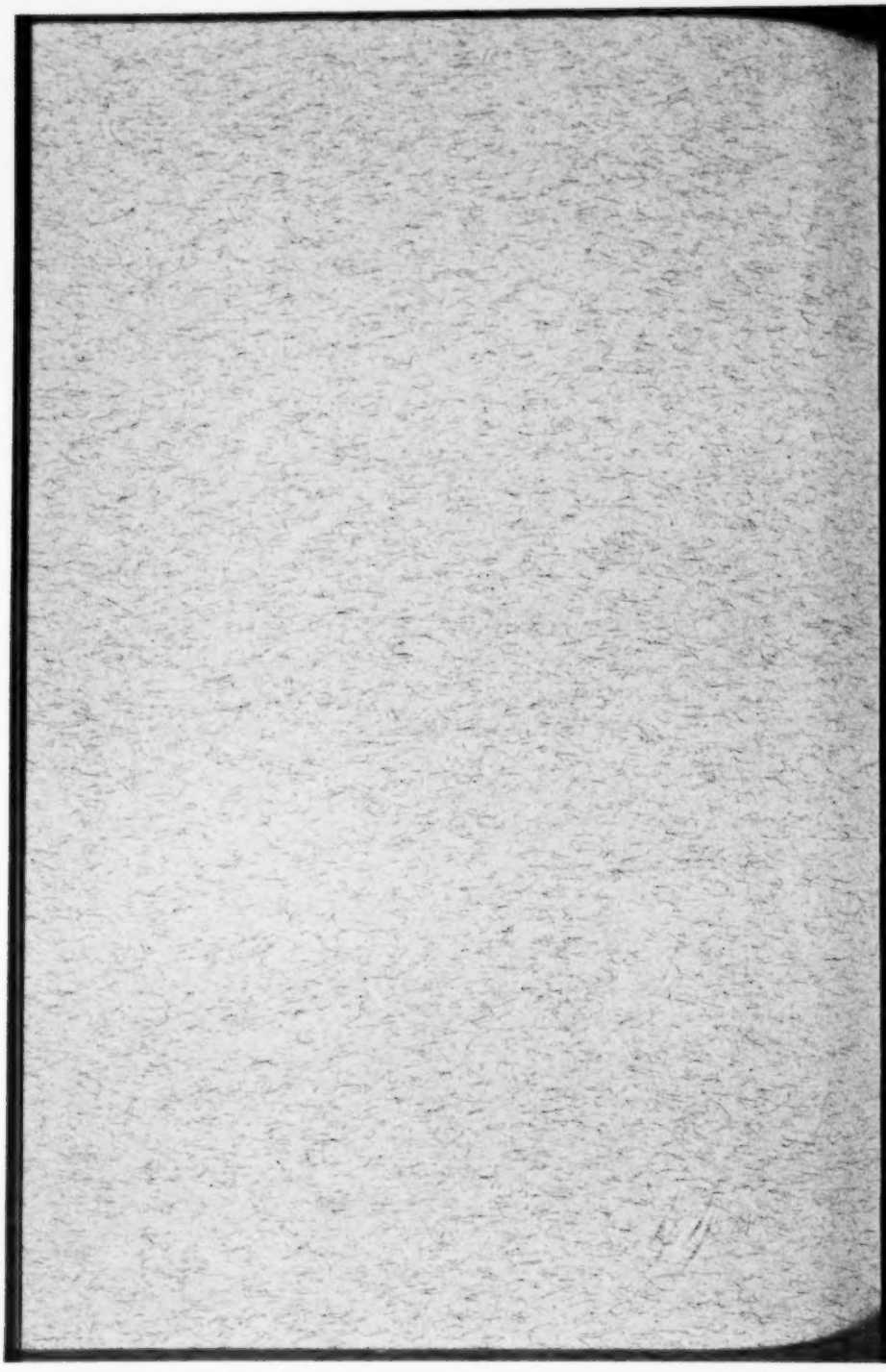

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 792

MAX STEPHAN, Petitioner

v.

THE UNITED STATES OF AMERICA.

Motion for Continuance of Order for Stay of Execution of Judgment.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, by his Counsel, and respectfully represents that should this Honorable Court deny the within petition for rehearing, that the order entered by this Court, April 14th, 1943, staying the execution of judgment be not vacated but continued, and in support thereof sets forth as follows:

1. That a motion for a new trial, based upon newly discovered evidence, was filed in the District Court for the Eastern District of Michigan, at Detroit, Michigan, on April 28th, 1943, and was noticed by counsel on April 28th, 1943, to be brought on to be heard on May 10th, 1943.

2. That said motion is made in conformity with Rule 2 (3) of the Rules of Criminal Procedure, promulgated by this Court on May 7th, 1934, under the Act of Feb. 24, 1923, c. 119, 47 Stat. 904 as amended, 18 U.S.C. 688.

3. That unless an order as prayed be entered, irrevocable injury will result.

4. That this is a meritorious motion, made in good faith, and is not filed for the purpose of delay.

Therefore this petitioner respectfully prays that the order by this Court entered April 14th, 1943, staying execution of judgment in the above entitled cause, be not vacated but continued until the proceedings, based upon the motion for a new trial, be finally disposed of.

NICHOLAS SALOWICH,

JAMES E. McCABE,

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 792

MAX STEPHAN
Petitioner,

v.

THE UNITED STATES OF AMERICA.

On Petition For Writ Of Certiorari To the United States Circuit Court Of Appeals For the Sixth Circuit.

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Max Stephan, Petitioner in the above-entitled matter, respectfully requests the above-entitled Honorable Court that

he be granted a rehearing in the above-entitled cause after decision made and entered therein on April 5, 1943, denying his Petition that a Writ of Certiorari be issued out of the above-entitled Court to the United States Circuit Court of Appeals for the Sixth Circuit so that the decision of the latter Court filed on February 6th, 1943, (affirming the judgment and sentence of the United States District Court in and for the Eastern District of Michigan on August 6th, 1942, that the Petitioner, "said defendant, Max Stephan, be by the said United States Marshal hanged by the neck until he, the said Max Stephen, is dead") might be reviewed by the Supreme Court of the United States and that the decision of said Circuit Court of Appeals be reversed. As grounds for said rehearing Petitioner respectfully sets forth the following:

That Petitioner was not served with a copy of the reply to the Petition filed herein or with Brief for the United States in opposition until on, or about, Saturday, April 5th, 1943, at about 10:00 A. M. of said day, Eastern War Time, said service having been made through the mail addressed to the law offices of counsel for Petitioner in the City of Detroit, Michigan, and that Petitioner has had no opportunity to meet the points made and arguments urged by the Honorable Solicitor General of the United States in opposition to the Respondent's Petition for Writ of Certiorari.

The Petitioner has no means whereby he can ascertain what persuasive force, if any, the Brief for the United States may have had upon the Court in reaching the decision denying the Writ of Certiorari. Whether this Honorable Court accepted Respondent's statements or denied the

Writ upon the inherent weakness of the Petition, counsel could not know. It is upon the assumption that the Court adopted the former course, that Petitioner believes he has suffered a prejudice in not having had an opportunity to be heard after receiving a copy of the Respondent's Brief, it having been received about the same time as the clerk's telegraphic notice of order entered denying petition.

Additional and major reasons which Petitioner submits should justify a reconsideration are that his Petition for Writ of Certiorari presented important questions of Constitutional Law and the serious question of interpretation and construction of the Constitutional definition of Treason.

This question is one of great importance to the Federal Jurisprudence. As it has never been determined by the Supreme Court of the United States it is now respectfully urged that the Honorable Court permit Petitioner the opportunity to be heard on the questions presented to the Appellate Court as to what constitutes Treason against the United States.

That since the entering of the Order denying the Petition for a Writ of Certiorari new evidence of extreme importance to the Constitutional rights of the Petitioner has been discovered, which evidence has prompted a motion for a new trial to be prepared for presentation to the United States District Court for the Eastern District of Michigan.

This motion urges that Petitioner now and at the time he was charged in the Indictment with the crime of Treason was not and could not have been a citizen of the United States nor owe allegiance to the United States under the Constitution (Art. 3, Sec. 3) or U. S. C., Title 18, Ch. 1,

Sec. 1 (March 4, 1909, Ch. 321, par. 341, 35 Stat. 1153) and could not be guilty of the crime of treason.

It is the contention of the Government that petitioner's argument that the overt acts alleged do not prove a crime "is predicated upon an erroneous concept of the essential elements of the crime of treason," and set up in support thereof (page 12 of Brief for the United States in opposition) that "on the breaking out of a war between two nations, the citizens or subjects of the respective belligerents are deemed, by the law of nations, to be enemies of each other" citing cases. The Government must definitely take a stand without ambiguity or equivocation, and cannot solely for the prosecution of its case against Max Stephan, impose upon him all the obligation of citizenship and while the appeal in the instant case was pending, sue Agnes Stephan, his wife, cancel her citizenship, on the grounds of fraud, by proceedings had in the District Court, Detroit, before the Honorable Edward J. Moinet, District Judge, and intern her in a concentration camp as an enemy alien, where she now is. The District Attorney under the law (U. S. C. A., Title 8, Sec. 738) must take steps to cancel citizenship procured by fraud and upon a showing made, the final order, preceding the certificate is voided (sub. "e" of Sec. 738, supra). This was done with Agnes Stephan whose certificate was obtained at the same time, under the same circumstances and on the identical grounds as that of the petitioner, her husband. The certificate of Max Stephan resting in the same category as that of his wife is equally void and he too is an enemy alien as she, yet for the sole purpose of prosecution, his citizenship is unassailed that the Government may say as they do (page 12, Brief, supra) "that the defendant owed allegiance to the United States." Manifestly, this could not be true if he were an

enemy alien as his wife now is, yet the Government persists in this paradox, and in going in diametrically opposite directions at the same time, irreconciliably bespeaks wanton, deliberate persecution.

That, further, additional new evidence has been discovered and included in the motion for a new trial, which evidence goes to the crux of the charge in the Indictment and tends to prove the total lack of intent or motive to commit Treason against the United States. An intention to commit Treason is an offense entirely distinct from the actual commission of that crime. *United States v. Burr,* 25 Fed. Cas. No. 14692 (a), at pp. 13, 14; that the statute under which Petitioner was prosecuted is unconstitutional in that it enlarges upon the Constitutional definition of Treason. Chief Justice Marshall, speaking in the Burr trial (25 Fed. Cas. No. 14692) said: "It is that of which the American people have been most jealous, and therefore, while other crimes are unnoticed they have refused to trust the National Legislature with the definition of this (treason) but have themselves declared in their Constitution that it shall consist ONLY in levying war against the United States, or in adhering to their enemies, giving them aid and comfort." *United States v. Burr,* 25 Fed. Cas. No. 14692.

No argument propounded by the counsel in opposition can reconcile the necessity under International Law of according War prisoners the courtesies due their position and rank with the fact that witness Krug is alleged to be an enemy, a secret agent for, spy for, and secret representative for the German Government (R. Vol. I, pp. 2, 37, 38, 54, 55, 83, 86, 87, 115, 116, 117, 119, 121, 284, 303, 304). (Government's Brief in opposition p. 19).

If Krug was a prisoner of War his status as such precluded the necessity of a charge of treason against petitioner. Krug as the record proves, was an escapee (R. 38) and had not contacted his superiors (R. 111) for nearly twenty months. The only punishment open to Krug under International Law "is disciplinary punishment" (Art. 50, p. 5238, Infra). (Prisoners of War Convention between United States of America and other Powers, signed at Geneva July 27, 1929, Art. 45-49, 50-51).

When Krug escaped from a Canadian War Prisoner's Camp he was a prisoner of War (Art. 45, p. 5237, supra) (R. 38). His status in America was still that of a prisoner of War and it remained such (R. 115) and that status remains unchanged. His total lack of contact with the German Government as proved on the trial (R. 111) negatives the alleged charges that he was an enemy within the constitutional definition of the crime of treason.

Petitioners well appreciate what motions for rehearing mean and what is necessary to exist in order to obtain their allowance. We are well aware that the Honorable Justices of this Court do not formulate orders or opinions excepting only in accord with true law, the facts being understood or admitted.

Being deeply and everlastingly based in the conviction that our cause is right we respectfully and earnestly urge indulgence and patience to reach truth and proper conclusions. We are appealing to this Honorable Court on the highest ground or nature and in furtherance of Justice.

Petitioners have struggled on in the appeal in the faith and well-grounded hope that law and justice will ultimately obtain in the Court in this cause.

Because of no opinion, nor any reason assigned and filed in the denial of the instant original petition for Writ of Certiorari we are at a loss to know just what to say in helpfulness to the Court in support of the present petition for rehearing.

We deem it prudent therefore to address ourselves to the Court to beg their indulgence for permission to make a short statement relying on the fact that, "Federal Appellate Courts, will, in the exercise of a sound discretion, notice error in the trial of a criminal case, although the question was not properly raised by objections below, where the refusal to review would shock the judicial conscience." *Weems v. United States,* 217 U. S. 349, 30 S. Ct. 544; and "There is a well recognized exception to the general rule (passing on the sufficiency of evidence not challenged in trial court) that, in criminal cases involving the life or liberty of the accused, the Appellate Courts may notice and correct plain errors in the trial of the accused which appear to have seriously prejudiced his rights, although those errors were not challenged or reserved by objections, motions, exceptions or assignments of error." *Kelly v. United States,* 76 Fed. (2d) 847; 122 Fed. (2d) 461. "On appeal in a capital case the court will consider the evidence as disclosed by the record to determine whether it was sufficient to support a verdict * * * although the record showed no exception taken to the deficiency of the evidence to support the record." *Lomax v. United States,* 37 App. (D. C.) 414.

The attorneys for Petitioner were not the attorneys on the trial. Because of failure to make timely objections and to save exceptions it was necessary, in order to settle a

proper bill of exceptions, to rely on the face of the record for assignments of error. The Order Settling the Bill of Exceptions (R. Vol. 1, pp. 31, 365, 366) included the entire transcript of all testimony and proceedings in the above entitled cause. On that record twenty-five errors were assigned to the Honorable Circuit Court of Appeals, Sixth Circuit. The opinion of that Court (R. Vol. II, pp. 1-37) commented frequently on the failure of trial counsel to offer timely objections (R. Vol. II, pp. 14, 26, 27, 30, 34) and to save exceptions.

Counsel for Petitioner did not deem it legal or proper to raise the question of dereliction of trial counsel nor damage to the civil rights of the respondent-petitioner due to tactical error of counsel but relied solely on assignments of error predicated upon palpable and incurable error appearing on the face of the record. Nor do we raise the question now except to point out to this Court the apparent prejudice to Petitioner's Constitutional rights to competent counsel especially in a criminal case in which the judgment and sentence was death by hanging. We feel bound to do this believing that the opinion of the Circuit Court of Appeals would have been different had proper objections been made and exceptions saved on the trial on which to base error. It is settled law that counsel cannot waive any rights of a defendant in a criminal case especially one involving the death penalty.

Furthermore, a careful reading of the opinion (R. Vol. II) discloses that the Honorable Court did not follow the Record in its entirety. Petitioner respectfully submits that there is a misconception of the face of the record set out in the opinion of the Honorable Circuit Court of Appeals (R. Vol. II, p. 31).

The original Brief of this Petitioner in Petition for Writ of Certiorari denied April 5, 1943, at pp. 67-70 attempted to point out the error to this Honorable Court and urged that in justice to this Petitioner that he be permitted to address himself to the Court and beg its indulgence so that the entire record might be placed before this Court for examination without regard to technical or tactical errors to the end that justice might be served.

That Petitioner has been advised by his counsel, and believes, that there is merit in his Petition that a Writ of Certiorari should be allowed in the present proceedings and he believes that if counsel can bring to this Honorable Court the actual points heretofore set forth and upon which counsel rely to invoke its jurisdiction, the merits of his cause will be sufficient to entitle him to a reversal.

Jurisdiction

The jurisdiction is invoked under Sec. 240 (a), 28 U. S. C., Section 347 (a). The Petition herein was denied by order of this Honorable Court entered April 5, 1943.

Statement of Facts

Statement of facts fully set forth in original Brief for Petitioner, pp. 25-31.

Questions Presented In the Original Petition

The original Petition filed herein presented the following questions:

1. Do the overt acts in the indictment support the charge of treason, and does the indictment with particularity and certainty charge the crime of treason?
2. Does aid and comfort to an individual for his sole benefit constitute aid and comfort to the enemy country?
3. Did the Court err in permitting witness Krug, a Nazi Luftwaffe Officer, to testify as a competent witness in a capital case in a Federal Court?
4. Did the Court err in permitting witness Krug to testify after giving the Nazi salute, and while attired in the full uniform of an officer of the German Army to the incurable prejudice of the substantial rights of the defendant?
5. Did the Court err in failing to compel witness Krug to answer proper questions on cross-examination?
6. Did the Court err in admitting incompetent, irrelevant, immaterial and obscence testimony which incurably prejudiced the substantial rights of the defendant?
7. Did the Court err in admitting incompetent and irrelevant testimony relative to acts and declarations of Krug elsewhere and subsequent to the overt acts charged in the indictment?
8. Did the Court err in admitting the incompetent and irrelevant exhibits, i. e., epaulets, a Greyhound Bus Company map, a revolver and cart-

ridges, Government's Exhibits 4, 9, 12 and 13, respectively, all of which were prejudicial to the defendant's substantial rights?

9. Did the Court err in failing to direct a verdict for the defendant upon conclusion of the testimony, because there was fatal variance between the indictment and the proof?

10. Did the Court err in failing to direct a verdict for the defendant upon conclusion of the testimony because of the insufficiency of the evidence, and was the verdict of the jury a miscarriage of justice?

11. Should the Court have declared a mistrial during the closing argument when the United States District Attorney made repeated reference to the defendant's failure to produce witnesses and made the direct statement that the defendant had not taken the stand?

12. Did the intemperate, improper and inflammatory remarks, inciting passion, in the closing arguments of the United States District Attorney prejudice the defendant's substantial rights?

13. Did the charge of the Court clearly define the crime of treason?

14. Did the charge of the Court fully, clearly and with particularity define an overt act constituting the crime of treason?

15. Did the charge of the Court fully, clearly and with particularity instruct the jury as to what constitutes 'adhering to the enemy, giving them aid and comfort'?

16. Did the words and phrase which alleged Krug to be, 'a secret agent for,' a 'spy for,' and 'secret representative of said Government of Germany in the furthering and carrying on of its war against

the United States,' incurably prejudice the defendant's substantial rights when the words and phrase were read, for the first time in the trial, by the Court in its charge to the jury; since the only testimony introduced was in direct refutation of those allegations?

17. Did the Court err in permitting the jury during the trial to separate each noon, and go home each night, relying solely on their discretion to protect them from unlawful exposure and the undue outside influences of personal contact, public sentiment, newspapers and radio?

Opinion Of Court Below

The opinion of the Circuit Court of Appeals for the Sixth Circuit is reported in 133 Fed. (2d) 87, and is printed in Vol. 2, pp. 14-37 of the Transcript of Record filed with the original Petition for Writ of Certiorari. This opinion affirmed the judgment and sentence of the United States District Court for the Eastern District, Southern Division of Michigan.

ARGUMENT

I.

The indictment is bad. The overt acts alleged standing alone or tacked together do not constitute a crime. The indictment does not allege overt acts which constitute the crime of treason.

Petitioner urges that the indictment is bad; that every indictment, to be sufficient, must have embodied within it, and alleged with certainty and precision, allegations of such acts as constitute overt acts which, standing alone or tacked together, constitute a crime. The overt acts alleged in the indictment in the case at bar (R. 1-6) do not set out a valid cause of action under any statute or law.

It is fundamental that an indictment, to be effective as such, must set forth the constituent elements of a criminal offense; if the facts alleged do not constitute such an offense within the terms and meaning of the law or laws on which the accusation is based, or if the facts may all be true and yet constitute no offense the indictment is insufficient.

The fact that the counts of an indictment are in proper form will not save them from the Constitutional objection that they do not sufficiently disclose the cause and nature of the accusation.

In the instant case, "the defect is not in form but in substance." *United States v. Cruikshank*, 92 U. S. 542, 556,

and, as reported in *Evans v. United States,* 153 U. S. 606, the Court quoted Lord Chief Justice Holt as saying, "a fact that appears to be innocent cannot be made a crime by adverbs of aggravation."

To permit an indictment to stand which charges as treason a number of alleged "overt acts" which do not or could not constitute treason, would only accomplish a miscarriage of justice.

Were it true that an indictment could contain a series of "overt acts" some of which did not constitute treason, and also that proof of any one of said acts charged in such case would sustain a conviction and the jury be instructed that if they believe any one of the acts to have been proved, they might return a verdict of "guilty as charged in the indictment," then there would be no refuge in the Constitutional guaranty that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act," and the prosecution could assure itself of a conviction by the simple expedient of including in the indictment as an "overt act" any act which might be easily susceptible of proof and impossible for the defendant to deny. In *Terry v. United States* (C. C. A. 9), 7 Fed. (2d) 28, 30, the Court said: "and further a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime."

Petitioner respectfully submits that each overt act of treason as mentioned in the Constitution, constitutes a separate, distinct and complete crime in itself. Each overt act, standing by itself must be a complete charge containing all the elements necessary to charge the crime of treason. (*United States v. Gooding,* 25 U. S. 473, 475; *United States v. Wilson,* 28 Fed. Case No. 16730, p. 718).

Petitioner urges that the indictment alleges overt acts that do not constitute a "charge which brings the accused clearly within the scope and requirements of the statute creating the offense, and so identifies the offense as to enable the accused to fully prepare his defense * * *." *Frisbie v. United States,* 157 U. S. 160, 166, 39 L. Ed. 657.

The crime of treason stands upon peculiar ground. The Constitution of the United States (Const. Art. 3, Sec. 3) does not elaborate the overt acts of treason but uses the limiting words, "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

The U. S. C. Title 18, C. 1, Sec. 1, says: "Whoever owing allegiance to the United States levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." (Mar. 4, 1909, Ch. 321, par. 1, 35 Stat. 1088.)

The adverb *"only"* is defined in Webster's International Dictionary (unabridged) as "no or nothing more or other than; for no other purpose, at no other time, in no otherwise, etc., than; exclusively; solely; merely."

The significance of this word "only" in the context undoubtedly was intended by the framers of the Constitution in defining the crime of treason to give full protection to the citizens by limiting its meannig so that no act of Congress could ever affect the rights of a person charged with that crime. It is to be believed that the design of the framers of the Constitution, and the people who adopted it, was to express the fundamental law in such terms as would embrace every present and future consideration.

The general Principles of Interpretation as followed by this Honorable Court is clearly stated in its own words: "Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a Constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts in giving construction thereto, are not at liberty to search for its meaning beyond the instrument."

"To get at the thought or meaning expressed in a statute, a contract or a Constitution, the first resort in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning * * * then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." *Lake County v. Rollins,* 130 U. S. 662, at page 670. "The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction." *Ex parte Yerger,* 8 Wall. 85, at page 101.

"Treason embraces the existence both of a state of mind and the commission of overt acts." *United States v. Werner,* 247 Fed. 709. "In order to constitute treason the accused must in general be guilty of some act which has for its direct aim the furtherance of the hostile designs of the

enemy." *United States v. Herberger,* 272 Fed. 290, quoting 30 Fed. Cas. No. 18272. "There can be no doubt that the words 'aid and comfort' are used in the statute in the same sense that they are in the clause of the Constitution defining treason, Art. III, Sec. 3, that is to say in their hostile sense.' *Young v. United States,* 97 U. S. 62. Chief Justice Marshall in the Burr trial, 25 Fed. Cas. No. 14692 said: "It is that of which the American people have been most jealous, and therefore, while other crimes are unnoticed they have refused to trust the National legislature with the definition of this (treason) but have themselves declared in their Constitution that "it shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort."

No one of the overt acts alleged in the indictment nor all of them tacked together constitute a crime. The intent to commit a crime cannot be impugned to innocent acts by the mere process of alleging overt acts within the four corners of an indictment thereby raising mere trespasses to the dignity of a public offense, particularly to the crime of treason. "The crime of treason should not be extended by construction to doubtful cases." *Ex parte Bollman,* 8 U. S. 75.

The mere fact that the body of an indictment alleges certain acts, and the form and requisites of an indictment are complied with will not elevate an otherwise innocent act to the degree of an overt act manifesting criminal intent tending toward the completion of a criminal object, nor one that has for its object the furtherance of the hostile designs of an enemy against the United States. "In order to constitute treason the accused must in general be guilty of some act which has for its direct aim the furtherance of the

hostile designs of the enemy while the state of war exists, which act involves a want of loyalty." *United States v. Herberger,* 272 Fed. 290, quoting 30 Fed. Cas. No. 18272. "The intent in giving aid and comfort to the enemy must be to tender such assistance to the enemy of the government, and not merely to assist another as an individual." *United States v. Fricke,* 259 Fed. 673, for, "There may be aid and comfort without treason." *Young v. United States,* 97 U. S. 62. "Without an intent to give aid and comfort to the enemy there is no treason." *Wimmer v. United States,* 264 Fed. 11 (C. C. A. 6).

The hiatus between misprision and actual participation in a criminal conspiracy to commit treason is vast.

This Honorable Court said in *United States v. Cruikshank,* 92 U. S., at page 557, "According to the view we take of these counts, the question is not whether it is enough in general, to describe a statutory offense in the language of the statute, but whether the offense here has been described at all," and at page 559, "but it is needless to pursue the argument further. The conclusion is irresistable that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them."

II.

Petitioner urges that aid and comfort for the sole benefit and comfort of an individual is without the evil intent and motive "to adhere to, give aid and comfort to an enemy" in direct furtherance of the hostile designs of the enemy country and is not treason.

No act alleged in the indictment as an overt act constituting treason can be interpreted as hostile to the United States of America. The one count setting out thirteen overt acts are but a recital of innocent acts toward an individual on his birthday.

The testimony adduced at the trial prove such acts to be harmless in effect and are each and all of them wholly devoid of any color of intent to be disloyal to, or hostile to the United States of America. A criminal intention cannot be assigned to an act merely by alleging it where the act itself does not manifest such intention. *United States v. Robinson*, 259 Fed. 685, at page 690.

An intent can only be inferred from the acts and words of the principals and in the crime of treason such acts must be induced by the intent to directly further the hostile designs of an enemy country together with an active, sympathetic, participating adherence to the enemy country. "In addition to obvious necessary elements, treason as thus defined, embraces the existence both of a state of mind and the commission of overt acts and prescribes why the latter shall be proven * * *. It is conceivable that a defendant

may have this condemned attitude of mind or be what is deemed a 'traitor at heart' and yet not expose himself to treason because he has created no hostile act." *United States v. Werner*, 247 Fed. 709. "Overt acts are such acts as manifest a criminal intention and tends toward the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled * * *. It may be possible to piece bits together of the overt act, but if so, each bit must have the support of two oaths." *United States v. Robinson*, 259 Fed. 694. Overt act must be clear proof, not conjecture or inference." 30 Fed. Cas. No. 18272.

In the *Burr case* it was adduced that men, boats, arms and provisions had been assembled, bullets had been manufactured, incriminating correspondence had been carried on. Chief Justice Marshall speaking in that case *(United States v. Burr*, 25 Fed. Cas. No. 14692) said: "But it is equally clear that an intention to commit treason is an offense entirely distinct from the actual commission of that crime." * * * "The crime really complete was a conspiracy to commit treason, not an actual commission of treason. If these communications were not treason at the instant they were made no lapse of time can make them so. They are not in themselves acts. They may serve to explain the intention with which acts were committed, but they cannot supply these acts if they be not proved." "A conspiracy to resist by force the execution of a law of the United States in particular instances only or a conspiracy for a personal or private, as distinguished from a public and national purpose, is not treason, however great the violence or force, or numbers of the conspirators may be." *United States v. Hanaway*, Fed. Cas. No. 15299 (2 Wall. Jr. 139). "In determining whether defendant is guilty

of adhering to, and giving aid and comfort the question of intent is a vital ingredient of the crime; and though he assisted an enemy alien, whom he knew to be such, he is not guilty where he intended merely to assist him as an individual, and not to give aid and comfort to enemies of the United States." *United States v. Fricke,* 259 Fed. 673.

The intent of this petitioner was adduced on the trial. What did the petitioner do that elicited the charges set forth in the indictment? He met a Nazi flyer through the medium of a third person, and within the first few minutes of their meeting (R. 168) the accused told him "why don't you give up, you haven't got a chance." Verification is found in the Nazi flyer's testimony (R. 95) "you should go back where you come from." "Did he (defendant) say that to you?" Krug answered, "Yes, that is right." This is further corroborated (R. 224, 230, 232).

Petitioner respectfully directs attention to the record (R. 108) where the testimony of Krug further corroborates the lack of intent or motive of the petitioner to do more than give aid to an individual.

> "Q. You remember testifying before the grand jury? A. Yes.
> Q. All right. Did the defendant, Max Stephan, at any time say to you that he wanted to destroy the Government of the United States? A. He wants to destroy the Government?
> Q. Did he ever say to you that he wanted to destroy the Government of the United States? A. No, never. He never said that to me.
> Q. Did you study Latin when you were in high school? A. Language?
> Q. Latin. A. No, I didn't study Latin.

Q. Do you know the meaning of the word 'subvert,' and I will ask the interpreter is there such a word in German the equivalent of our word 'subvert' and the noun 'subversion'?

The Interpreter: No, there isn't.

Mr. Amberson: No such word?

The Interpreter: There isn't, but, of course, it can be expressed in German, yes.

Mr. Amberson: All right.

(Question interpreted.)

The Interpreter: Yes, he knows exactly what 'subvert' means.

Q. (By Mr. Amberson, continuing): Did Max Stephan say anything to you to the effect that he wanted to bring about a subversion of the American Government? A. No, he didn't tell me anything about it.

Q. During your conversation with him, did you say anything to him about destroying the American form of government? A. No.

Q. Have you been made any promise of a parole by the British Government because of your testimony in this case? A. No, they didn't do anything.

Q. Are you expecting any special privileges as a prisoner of war because of the fact that you have come here and volunteered to testify in this case? A. As far as the British or by you?

Mr. Amberson: I think perhaps a translation should be made.

The Interpreter: You mean in Canada?

Mr. Amberson: Yes, that is right.

(Question interpreted.)

A. No, I don't expect anything from the Canadian Government.

Q. (By Mr. Amberson, continuing): Now, did you request of Max Stephan at any time during your conversations any aid from him for the Government of Germany except as it applied to you individually?

(Question interpreted.)

A. No, I didn't.

Q. And that was not your purpose in talking with Max Stephan, was it? A. No.

Q. To secure aid for the Government of Germany? A. It was just my purpose to get back to Germany again.

Q. And it was not your purpose to tear down the Government of the United States, was it? A. Of course not.

Q. Now, you stand today in this court room, witness, as an enemy of our country; that is true, is it? A. Yes, it is.

Q. And those of us who are here in this court room, we are your enemies; that is true, is it not? A. Of course you are.

Q. I ask you, therefore, what is—strike it. You understand from your knowledge of international law that there is no power on earth that can make you testify in this lawsuit unless you wanted to; you know that? A. That is right.

Q. Will you state to the jury then what your purpose is in coming here as an enemy of this country and testifying in this case against a man who is charged with treason against our country; what is your purpose. your object? A. The purpose is to clear out that he didn't do what he is charged with. I was only asked to tell the truth about the case and what is wrong, what FBI has charged him and all the other persons who are charged with having known who I am."

The signed statement given to special agents of the Federal Bureau of Investigation at the time of petitioner's arrest, and introduced on the trial over objection of counsel (R. 218) gives a summary of the acts of petitioner on which the overt acts of treason were predicated and charged in the indictment. In that statement (R. 225) the lack of intent to be disloyal to his country and the total absence

of an evil motive to further the hostile designs of an enemy country is found in petitioner's words: "About 11 o'clock a friend of mine named Bill Nagel, who used to be postmaster in the last war, came into my place, and I asked him for advice. I asked him what he would do if a lady he knew called him up and said she had a German war prisoner in her place. I told him the man wanted to go to Chicago. He agreed that maybe he would help the man get to Chicago." Again (R. 225): "I then closed my place about 12 o'clock. Right after I had closed, the clerk from the Field Hotel rapped on the door and told me about a fellow who looked funny to him, coming to the Field Hotel. The clerk said that this man could be a German War prisoner from Canada. To this I didn't make any comment. He suggested that he bring the fellow over to my place the next morning so I could have a talk with him. I told him not to do that because I didn't want anything to do with him."

The foregoing words in the record are the only utterances in the entire testimony that relate to subversive or treasonable acts and clearly indicate the reason for Krug's (Nazi flyer) presence in Detroit, and a total lack of conspiracy to commit treasonable acts against the United States and directly in furtherance of a hostile design of an enemy Country. The entire record, with these few exceptions, is filled with testimony relating to acts that were purely personal in nature and none of them constitute a crime.

Certain of the alleged "overt acts" merely charge meeting together, conferring together, counseling, or giving false and misleading information. It has been uniformly held that neither utterances nor meeting and conspiring can ever amount to overt acts of Treason. *Wimmer v. United States*, 264 Fed. 11, pp. 12, 13; *Ex parte Bollman*, 18 U.

S. (4 Cranch) 75; *United States v. Hoxie,* 26 Fed. Cas. No. 15407, p. 399. In the case of *Wimmer v. United States,* 264 Fed. 11, at page 13, the Honorable Circuit Court of Appeals, Sixth Circuit, said: "Thus we find, in the constitutionally defined crime, two elements, the intent and the act; neither is dominant. Intent minus the act is not treason, any more than act minus intent is."

Petitioner respectfully avers that there was no overt act of treason laid in the indictment, that it was bad for want of certainty and precision. "How ever flagitious may be the crime of conspiring to subvert by force the government of our Country, such conspiracy is not treason. * * * It is more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases." *Ex parte Bollman,* 8 U. S. (4 Cranch) 75. It is not sufficient that the accused person shall merely have knowledge that another person "was an enemy of the United States." He must actually do some act in furtherance of a hostile design with an evil motive and intent to give aid and comfort to an enemy before he can be guilty of treason. Mere words which tend to conceal the identity of another person is not treason. The doctrine of treason under the Constitution of the United States, hangs upon the intention of the accused to give aid and comfort and adherence to the National enemies of the United States as distinguished from giving aid or comfort to an individual alien enemy in his personal wants and comforts. *United States v. Fricke,* 259 Fed. 673. "Further distinction is found in the very words of the Constitutional definition. Treason is "adhering to their enemies, giving them aid and comfort." Both adherence and giving aid are necessary. To 'favor or support'

is, very likely, 'to adhere'; but it does not carry the idea of giving aid and comfort, unless by a rather remote implication. Hence, it may well be said that adherence by words only is an offense quite distinct from treason."

At page 402 of the *Hoxie case* Justice Livingston made the following pertinent comment: "Once disregard these exceptions, and render the constitutional rule as flexible or comprehensive as it is now suggested to be, and prosecutions for treason will become as common as indictments for petit larcenies, assaults and batteries, or other misdemeanors. If every opposition to law be treason, for very like this is the language we have heard, as all offenses partake in some measure of that quality, who can say how many of them will in time become ranged under the class of treason. Neither you, nor the Court, can feel any ambition of leading the way, in setting a precedent so dangerous, or one that in any degree tend to demolish that barrier which has been raised by the Constitution against constructive treasons." *United States v. Hoxie,* 26 Fed. Cas. No. 15407, at page 399. Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself and getting its treasonable character only from some covert and undeclared intent. * * * "Therefore I have the gravest doubt of the sufficiency of the first and second overt acts of the first count and of those of the second count, which consists of acts that do not openly manifest any treason. Their traitorous character depends upon a covert design and as such it is difficult for me to see how they can conform to the requirement." *United States v. Robinson,* 259 Fed. 685, at page 690. "Every fact necessary to constitute the crime charged must be directly and positively alleged, and nothing can be changed by implication

or intendment." *United States v. Philadelphia & R. Ry. Co.*, 232 Fed. 953, at page 955.

On re-direct examination (R. Vol. I, p. 111) the utter impossibility of Krug to have had contact with any of his superior officers or with the German Government in any manner, was established by the Assistant United States District Attorney as here quoted:

"By Mr. Babcock:

Q. Lieutenant, in what country were you born? A. Germany.

Q. You are a citizen of the Government of Germany? A. That is right.

Q. As well as being a military officer? A. Yes.

The Court: In what part of Germany were you born? A. In Bavaria.

Q. And, of course, you are a subject of the Government of Germany? A. Yes.

Q. Now, Mr. Amberson was asking you about communication with your superior officers— A. (Interposing): Yes, sir.

Q. (Interrupting): Now, as a matter of fact, your communication is all through the Swiss Consul, isn't it? A. Yes.

Q. Any communication you have with the Government of Germany is carried on through the Swiss Consul? A. Yes."

How then can it be claimed that Krug, not having had contact with his superior officers or with the German Government from the 28th day of August, 1940, when he was captured in England (R. Vol. I, page 37) to the 18th day of April, 1942, when he entered the United States illegally (R. Vol. I, p. 38), be said to be "a secret agent for, spy for, and secret agent of said government of Germany" (R. Vol. I, p. 2)?

How can the intent of petitioner to give assistance to an alien, who had not been legally admitted into the United States, for his sole benefit, be constructed by implication and intendment into overt acts charged in the indictment (R. Vol. I. pp. 1-6) as the overt acts of treason with the intent and evil motive to adhere to and give aid and comfort to an enemy in the furtherance of the hostile designs of an enemy country? Assistance to, and harboring an alien, who had not been legally admitted to the United States, for his sole benefit is not treason. Petitioner respectfully urges if these acts were not treason at the instant they were made no lapse of time can make them so. *United States v. Burr,* 25 Fed. Cas. No. 14692.

III.

Witness Krug, an officer in the German Luftwaffe and a sworn adherent to the Nazi philosophy, could not testify as a competent witness in a criminal trial in a federal court.

Petitioner respectfully urges that the doctrine of the *Funk case* should not apply to the competency of witnesses generally, and serve to remove the disability placed upon certain classes of witnesses from the inception of our Federal Courts in abrogation of the doctrine established by *United States v. Reid,* 12 How. 361, affirmed and prevailing through the long line of decisions down to the *Funk case.*

Relying on the rights of persons as guaranteed in the Constitution Amendment VI, Petitioner respectfully submits that the right to be confronted with witnesses against him guarantees the defendant the right to be confronted with

COMPETENT WITNESSES and that "competency" as applied to witnesses involves both capacity and qualifications, and imparts existence of all essentials to render him fit to testify.

Petitioner in his brief to the Circuit Court of Appeals, Sixth Circuit, set out at length the reasons for his contention that Krug was an officer of the German Luftwaffe, adhering to the Nazi philosophy, wholly devoid of moral principles, and with such disregard of the sanctity of an oath or affirmation as to bar him from giving evidence in a capital case in a Federal Court of the United States.

The Honorable Circuit Court of Appeals in its opinion (R. Vol. II, pp. 26, 27) said: "This proposition was not raised at the trial and was probably waived by appellant's cross-examination of Krug. However, we think it not improper to discuss it briefly. When a witness takes the stand to testify, the law presumes that he is a competent witness, and incompetency must be shown by the party objecting to him. *Wharton on Criminal Evidence*, 10th Ed., Vol. 1, Sec. 358, p. 721."

Every accused having the constitutional right to counsel must rely wholly on his counsel. If the tactical errors of such counsel to raise proper and timely objection incurably waived an inviolable right of the defendant, to his damage, and prejudiced his interests and jeopardized his life and liberty it would be repugnant to those fundamental principles of liberty and justice guaranteed by the Sixth Amendment not to take full cognizance of those errors. "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Aetna Ins.*

Co. v. Kennedy, 301 U. S. 389; *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292; *Glasser v. United States,* 86 L. Ed. 405 (412).

Deciding against the contentions of petitioner in his appeal the Honorable Circuit Court of Appeals (R. Vol. II, p. 26) said: "It is said Krug was incompetent as a witness under the laws of Michigan and that the Federal Courts are bound thereby. Granted that this was the old rule, an important exception has been engrafted upon it. In *Funk v. United States,* 290 U. S. 371, the Court said in substance that in criminal cases federal courts are not bound by such rules but that in the development of truth they are to apply them as they have been modified by changed conditions." Petitioner urges that in the *Funk case* the sole inquiry went to the competency of a wife to testify in behalf of her husband in a criminal case; the question of her competency to testify against him was not before the court. In the *Benson case, Benson v. United States,* 146 U. S. 325, at p. 326, the question was whether the evidence of a wife was improperly admitted against her defendant husband in a criminal trial, and whether one Mary Rautzohn who had gained a severance was a competent witness against the defendant. In *Rosen v. United States,* 245 U. S. 467, at page 470, the Court said, "While the decision in *United States v. Reid, supra,* has not been specifically overruled, its authority must be regarded as seriously shaken by the decisions in *Logan v. United States,* 144 U. S. 263, 301, and in *Benson v. United States,* 146 U. S. 325."

Even though the Court in deciding the *Rosen case* accepted the authority of the *Benson case* rather than that of the earlier decisions and disposed of the questions "in the light of general authority and sound reason," petitioner

respectfully urges that the reasoning in these two cases, which was affirmed in the *Funk case* (290 U. S. 371) could not have anticipated a situation in which a Nazi adherent would be offered as a witness by the prosecution in a criminal case in a federal court. This Court has said in *Funk v. United States* that "public policy is not fixed, but may change under changed conditions as regard competency," and following the words of the Court in the *Rosen case* petitioner urges that when the reason for the rule ceases to exist the rule itself ceases to exist. The reasons for the old rule founded on the Common-law disabilities and set out in *United States v. Reid,* 12 How. 361, was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest.

In the instant case, under unique and changed conditions, and consistent with the costitutional guaranty to be confronted by competent witnesses pursuant to the intention of the framers of the Constitution and in the light of the authority in the *Reid case* and the long line of decisions which accepted its authority, petitioner respectfully submits that the reason for the rule in the *Funk case* has ceased to exist; that Krug was not a competent witness in a criminal case in a federal court; that the oath of allegiance to Germany bound him unswervingly to the morally depraved philosophy that denies the existence of a power other than nature.

A witness must be bound in conscience. The competency of a witness in a capital case is to be measured by the doctrine, "When evidence is estimated quantatively it is the

support of the oath that counts." *United States v. Robinson*, 259 Fed. 691. Tested by the chaotic conditions now involving the world the philosophy and practices of the Nazi regime is raised to the level of the most heinous criminal philosophy in all history. If the rule in the *Funk case* should prevail it would become enlarged to the point where civil liberties would be threatened. If Krug is a competent witnes then it must follow that Rudolph Hess, the notorious Nazi leader now a prisoner of War in England, would likewise be competent to testify in a criminal case in a Federal court if the prosecutors for the Government would elect to call him. Public policy requires that the reason for the rule in the *Funk case* does not hold in the instant case. "We hold only that decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here. In so doing, we respect the policy which underlies congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." *McNabb et al. v. The United States*, No. 25, October Term, 1942, Decided March 1, 1943.

IV.

The admissibility of incompetent, irrelevant, immaterial and obscene testimony, part of which was stricken too late, was highly prejudicial and incurable.

The legal presumption is that error produces prejudice. *Todd v. United States*, 221 Fed. 209, 210. It is beyond the limits of human belief to expect that any jury, sitting in a criminal case, after weeks of newspaper headlines and blasting radio newcasts had repeatedly been before the attention of the general public, the emotions of war, inciting passions and prejudices, everywhere expressed, could be entirely free from the dangers of that influence. "Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained." *Mattox v. United States*, 146 U. S. 140, 151. The presence of Krug in the full uniform of a Nazi Luftwaffe officer testifying as a Government witness was prejudicial to the defendant's rights because it incited hatred by continually reminding the jury of war and the hysteria accompanying it. The Von Werra matter (R. 70-73) was irrelevant and prejudicial. There was absolutely no connection between the Von Werra matter and the charges against the defendant. It was not harmles hearsay (R. 73) (R. Vol. 2, p. 32) because the entire testimony implied that there was a connection between the Von Werra matter and the instant case. Counsel objected (R. 71) the prosecution promised to connect it up, but never did, the court overruled the objection (R. 72). The error was not cured by instruction to the jury at any

time, nor referred to in the Charge of the Court. The testimony regarding Krug's relations with immoral women (R. 185-193) was obscene. "We are of the opinion that the ruling of the lower Court in refusing to exclude this testimony was prejudicial error." *Tootham v. United States,* 203 Fed. 220 The court, too late (a day and a half later), struck the testimony (R. 259-263) of these two women. The error was not cured. Error was committed when the testimony of Witness Parker (R. 201-208, 233) was admitted together with Exhibits 4, 9, 10, 12, 13 (R. 366). The error was not cured by striking the testimony too late (next day) (R. 259-263). The court did not exclude the erroneously admitted exhibits (R. 260) which were wholly incompetent, irrelevant and immaterial and damaged the substantial rights of the defendant. The entire testimony of the government witnesses was incompetent and irrelevant because none of it proved an intention to commit an overt act constituting a crime; all the testimony was corroborative of acts which lacked the essentials to raise them to the degree of overt acts constituting a crime. The evidence was cumulative and referred to extraneous matters. The words of this Honorable Court in *Boyd v. United States* is in point:

> "Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may

have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged." *Boyd v. United States,* 142 U. S. 450, 12 Sup. Ct. 392.

Referring to the signed statement of the petitioner (R. 223-226) the words of the Court in *United States in Fries, infra,* are pertinent, "We come now to the confession of the prisoner voluntarily made on his examination before Judge Peters. Here is a point of law relied on by the prisoner's counsel—that no man should be convicted of treason but on the evidence of two witnesses or upon confession in open court. * * * But happily our Constitution would not admit it if a hundred would swear to it. That danger is wisely avoided." *United States v. Fries,* 9 Fed. Cas. No. 5126, p. 914. The statement of defendant introduced (R. 217) objected to (R. 219) and admitted (R. 222) was not corroborative of any testimony to overt acts of treason and there were not two witnesses to any same overt act of treason as required by Constitution Art. 3, Sec. 3. The signed statement constituted the crux of the government's case against the petitioner. "Accordingly the question for our decision is whether the incriminating statements made under the circumstances we have summarized were properly admitted." *McNabb v. United States,* No. 25, October Term, 1942, decided March 1, 1943. This Honorable Court in the same case, *McNabb v. United States, supra,* at page 6, said: "It is true, as the petitioners assert, that a conviction in the federal court, the foundation of which is evidence obtained in disregard of liberties, deemed fundamental by the Constitution cannot stand." *Boyd v. United States,* 116 U. S. 616; *Weeks v. United States,* 232 U. S. 383; *Gouled v. United States,* 255 U. S. 298; *Amos v. United States,* 255 U. S. 313; *Agnello v. United States,* 269

U. S. 20; *Byars v. United States* 273 U. S. 28; *Grau v. United States,* 287 U. S. 124. And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questions of ignorant and untutored persons in whose minds the power of officers was greatly magnified,' *Lisbena v. California,* 314 U. S. 219, 239-40; or 'who have been unlawfully held in communicado without advice of friends or counsel,' *Ward v. Texas,* 316 U. S. 547, 555, and see *Brown v. Mississippi,* 297 U. S. 278; *Chambers v. Florida,* 309 U. S. 227; Canty v. Alabama, 309 U. S. 629; *White v. Texas,* 310 U. S. 530; *Lomax v. Texas,* 313 U. S. 544; *Vernon v. Alabama,* 313 U. S. 547." *(McNabb v. United States, supra.)*

V.

The general verdict of guilty as charged was a miscarriage of justice. There was fatal variance between the indictment and the proof, and a complete failure to submit any evidence of an overt act supported by the testimony of two witnesses to the same overt act essential to sustain the crime of treason.

In the case at bar the indictment charges (R. 15), generally, that the "giving of aid and comfort by said Stephan to said Peter Krug during April 18, 1942, and April 19, 1942, consisted in his receiving and treating with said Peter Krug, in his furnishing to said Peter Krug hospitality and entertainment, in his furnishing to and obtaining for said Peter Krug money, necessities of life, and personal effects, in his harboring said Peter Krug, in his concealing the identity of said Peter Krug, in his giving of false in-

formation to citizens of the United States and others with the intent to conceal the identity of said Peter Krug, in his arranging for and providing transportation and means of transportation in and about Detroit, Michigan and transportation and means of transportation from Detroit, Michigan to Chicago, Illinois, and his failure to report to proper public officials and to military officials, law enforcement agents, agents, representatives, immigration officials and Department of Justice officials and agents of the United States of America, the presence in the United States of said enemy Peter Krug." (R. 15)

The foregoing quoted verbatim from "Plaintiffs Requests to Charge" (R. 15) enumerates more concisely than a statement of facts the gist of the Government's charge in the indictment. The body of the indictment in the case at bar is in one count consisting of twelve overt acts containing a multiplicity of charges, some of which allege harboring an alien not legally admitted to the United States, some acts allege misprision, others allege aid and comfort for the sole benefit of an individual and none of the acts alleged in the indictment charge an overt act containing the essential elements of the crime of treason. It has been uniformly held that neither utterances nor meeting and conspiring ever amount to overt acts of treason. *Wimmer v. United States,* 264 Fed. 11, 12, 13; *Ex parte Bollman,* 8 U. S. (4 Cranch) 75; *United States v. Hoxie,* 26 Fed. Cas. No. 15407, p. 399. "The crime of treason should not be extended by construction to doubtful cases" *Ex parte Bollman,* 8 U. S. (4 Cranch) 75. "The doctrine of constructive treason has produced much real mischief in another country; and it has been, for an age the subject of discussion among lawyers, other public speakers, and political writers." *United States v. Fries,* 9 Fed. Cas. No. 5126 at p. 909. In

Wolf v. United States, 259 Fed. 388 at page 394 the Circuit Court of Appeals, Eighth Circuit said: "The greatest danger to justice from a jury is through a confusion of the real issues in the case", and the case of *McElroy v. United States*, 164 U. S. 76, at page 80 enlarges upon the need to confine the indictment to one distinct offense.

The motion for Directed Verdict (R. 236), denied (R. 237) was predicated upon the total lack of proof sufficient to prove an overt act of treason.

Marshall C. J. speaking in *United States v. Burr*, 25 Fed. Case No. 14693, at pp. 179, 180, says:

> "The Constitution and law require that the fact be established by two witnesses. Not by the establishment of other facts from which the jury might reason to the fact. The testimony then is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses in such manner that the question of fact ought to be left with the jury. * * * That overt act must be proved according to the mandates of the Constitution and of the Act of Congress by two witnesses. It is not proved by a single witness."

Petitioner urges that "all the circumstances as proved must be consistent with each other, and they are to be taken together as proved. Being consistent with each other and taken together they must point surely and unerringly in the direction of guilt. All the facts and circumstances taken together as proved must not only be consistent with the inference that the accused is guilty, but they must at the same time be inconsistent with the hypothesis that he is innocent and with every other rational hypothesis. Mere suspicions, probabilities or suppositions do not warrant a

conviction." Underhill's Criminal Law (4th Ed.) at p. 23. "It is a positive rule of criminal procedure that the accused shall not be charged with one crime and convicted of another," *The Hoppet,* 7 Cranch 389 (394), 3 Law Ed. 380. In *Wolf v. United States,* 259 Fed. 388, at page 394, the court said, " * * * Patriotism must not become, even innocently, a cloak for injustice. The right of an accused in the courts of this nation to a fair trial must not vary with the character of the crime." The law of treason is carefully reviewed in *United States v. Robinson,* 259 Fed. 685, and Petitioner urges that the reasoning of this case fairly indicates the necessity for the jury to specify the particular overt act of treason of which they find the defendant guilty, where more than one overt act is alleged in one count in the indictment.

A sentence cannot rest upon a general verdict of guilty, where the indictment charges several alleged offenses, the nature of which are not identical, especially where none of the offenses charged contain the essential elements necessary to charge the crime of treason. Some of the acts charged in the present indictment partake of and consist in charges of other offenses, namely, the crime of harboring and assisting an alien not legally admitted to the United States, and other acts which cannot be classified as crimes of any sort.

> "In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the jury, or otherwise, that it is the settled rule in England and in many of our States, to confine the indictment to one distinct offense or restrict the evidence to one transaction." *McElroy v. United States,* 164 U. S. 76, at page 80.

Petitioner respectfully submits that the Honorable District Court erred in denying the motion for Directed Verdict (R. 237, 238). "The Constitution having declared that treason shall consist only in levying war, and having made the proof of overt acts necessary to a conviction is a question of vast importance, which it would be proper for the Supreme Court to take fit occasion to decide, but which an inferior tribunal will not willingly determine unless the case before it should require it." 25 Fed. Cas. No. 14693, at page 181. In the case at bar the charge of harboring and giving assistance to an alien illegally admitted to the United States was raised to the dignity of a charge of treason consisting a fatal variance between the indictment and proof.

VI.

The United States District Attorneys made repeated reference to the fact that no witness had testified for the defense, resorted to intemperate, improper remarks and by inference, implication and innuendo incited passion in the jury in violation of defendant-petitioner's substantial rights.

Petitioner urges that, "no man feeling a correct sense of the importance which ought to be attached by all to a fair and impartial administration of justice, especially in criminal prosecution, can view without extreme solicitude, any attempt which may be made to prejudice the public judgment, and to try any person, not by the laws of his country and the testimony exhibited against him, but by public feelings, which may be and often are artifically excited against the innocent as well as the guilty." 25 Fed. Case No. 14692

b), at p. 27. A prosecutor must be fair, he must draw a careful line (R. 305); he should not seek to arouse passion or engender prejudice. Comments by the United States District Attorney, direct or indirect, upon the defendant's failure to testify, constitute misconduct on his part, and is *per se* grounds for reversal of a judgment of conviction. In the case at bar the United States Attorney made very definite reference to the failure of defendant to testify when he said (R. 305), "Why in the name of heaven didn't he bring some witnesses in here to contradict what Krug said?" well knowing that the defendant was the only witness who could refute Krug's testimony. On objection the Court said (R. 305), "Mr. Lehr, I can see crossed the line * * *," but the District Attorney immediately afterward said (R. 305), "Krug's statement stands on the record, ladies and gentlemen of the jury, absolutely uncontradicted."

Petitioner in his original pettiion urged (Orig. Pet. pp. 74-82) that the doctrine of *Berger v. United States,* 295 U. S. 88, 89, be invoked and respectfully submitted that a mistrial should have been ordered by the trial court. These are times of war when the passions and feelings run high and a more solemn duty rests upon the court to guarantee that fair trial which the Constitution guarantees. The prosecuting attorney at the outcome of his argument (R. 300) called attention to the War, as a prelude for his plea for a verdict of guilty; he intimated broadly that the death penalty would not be invoked (R. 303), then proceeded in his argument to denounce the defendant as "a traitor, a blackhearted traitor" (R. 306) (R. 307) and continued to incite prejudice and passion by appealing to the patriotism of the jury (R. 303, 304, 309, 310, 313) and then (R. 317):

> "You ladies and gentlemen of the jury, today, in these days of war, when our boys are on the front facing

> the firing squads in order to protect America, you twelve men and women here in this jury box, in this Federal Court room, constitute the very front line of defense of this country in behalf of protecting the internal security of America, and in that sense, ladies and gentlemen, your Government, my Government—God forbid, Max Stephan's Government, asks you to return a verdict of guilty as charged."

The district attorney well knew that the witness on which the Government relied was a prisoner of War (R. 37, 38, 83, 115, 116, 119, 304, 307), an alien who had illegally entered the United States. Petitioner urges that the closing argument of the district attorney incurably prejudiced his substantial rights and a mistrial should have been ordered by the Court instanter.

VII.

Petitioner urges that the court failed to charge with definiteness, clarity and certainty as to what constitutes overt acts in adhering to and giving aid and comfort to an enemy country, and omitted to charge on other requisites.

In the case at bar the entire record went up to the Circuit Court of Appeals, Sixth Circuit, as a settled Bill of Exceptions. Petitioner's counsel, not having been the attorneys on the trial, and the record being almost devoid of proper and timely objections, relied solely on the doctrine that on appeal in a capital case the Court, after an examination of the entire record, will consider the evidence as disclosed by the record to determine whether it was sufficient to support

a verdict, without regard to technical errors, although the questions were not properly raised by objections below, where the refusal to review would shock the judicial conscience. *Weems v. United States,* 217 U. S. 349, 30 Sup. Ct. 544; *cf. Lomax v. United States,* 37 App. (D. C.) 414; *Safford v. United States,* 233 Fed. 495; *Dejianne v. United States,* 282 Fed. 739; *Pace v. United States,* 27 Fed. (2d) 519; *Kelly v. United States,* 76 Fed. (2d) 847; *Alberty v. United States,* 91 Fed. (2d) 461.

Petitioner respectfully submits that the charge is presumed to be for the assistance of the jury and must, therefore, be so presented in such language that it shall be understandable. The charge must be responsive to the matter under consideration and the language of the Court is the only proper evidence of what the law is on the facts in the possession of the jury so that they may determine the issue according to the law and the evidence. This requirement is not filled by an abstract exposition of legal principles. The jury, under the impressiveness and dignity of the judicial office, the venerable and upright character of its occupant, and the learning, acumen and experience which the judge is assumed to possess are unconsciously influenced to accept everything that comes from his lips as authoritative and they permit his opinions upon the issues of fact involved, so far as he may announce them, to guide them in their deliberations.

Petitioner urges that the crime of treason, is of rare occurrence. The public, generally, are unaware of the elements necessary to constitute the crime of treason and a jury could not of common knowledge be aware of the essential elements of the crime, and, regardless of an hundred facts placed before them in evidence, they could not be ex-

pected to apply those facts in reaching a correct verdict without careful painstaking,comprehensive instruction as to the law on the facts.

It has remained for the courts to interpret what constitutes the overt acts of "adhering to, giving aid and comfort" to an enemy and from a diligent search of the cases reported it is clear that the courts have done so only with extreme caution and obvious reluctance to construct alleged acts from misdemeanors to the dignity of the high crime of treason. *United States v. Burr*, 25 Fed. Cases No. 14692, 14693; Fed. Case No. 18,276 (2 Wall Jr. 134); *United States v. Herberger*, 272 Fed. 290, quoting 30 Fed. Cas. No. 18,272; *Ex parte Bollman* 8 U. S. (4 Cranch) 75; *United States v. Fricke*, 259 Fed. 673; *United States v. Robinson*, 259 Fed. 690.

The jury, of course, are bound to follow the law as given to them by the judge. *Carrol v. United States*, 16 Fed. (2d) 951. The rule as to confessions seems to be, if the court determines its admissability, (R. 222) that the Court is to submit the question to the jury with proper instructions upon it. *Wilson v. United States*, 162 U. S. 623. The Court in its charge omitted to instruct on the admissability of the statement (R. 222-226) and omitted to instruct the jury that the Constitution required anything in the nature of a confession to be a "confession in open Court" and that no confession could be admitted in evidence, except as corroborative or confirmatory until two witness had testified to the same overt act of treason.

The "Von Werra matter" (R. 70-73) was incompetent, irrelevant and prejudicial to the defendant's substantial rights. Its admissability was objected to (R. 71) but overruled (R. 71-72), the court at the time saying, R. 72) "Well,

I will overrule the objection, but unless it is connected up I will strike it out." The Court never again referred to the matter on the trial nor in his charge. It was never connected up, nor ever struck from the record although it was irrelevant, incompetent and highly prejudicial. The United States District Attorney stated to the court that the "Von Werra matter" was irrelevant to the instant case but was important to another case (R. 71). "Mr. Babcock: Not yet, but I submit to the court that we will connect it up * * * * * not necessarily with this case, but the corroboration of it appearing, the conversation, and I think it is rather important." The district attorney prosecuting the accused on the charge of treason prejudiced the substantial rights of the defendant by introducing evidence of "another case". The Court was under a duty to strike the Von Werra matter and seasonably and properly instruct the jury so that this matter could not have been before them in the jury room during their deliberations to the prejudice of defendant's rights.

Petitioner respectfully submits that the charge of the court (R. 318-341) was not comprehensive and clear as to the law on the facts of what constitute "overt acts of treason"; that the reading of the words "a secret agent for, spy for, and secret representative of the said government of Germany", brought to the attention of the jury for the first time on the trial by the court in its charge was prejudicial error, inasmuch as the indictment had not been read to the jury, and they had not heard the inflammatory words before, nor had they been subject to any testimony or evidence to support the allegation. No attempt was made to cure, explain or rule out the phrase; they stood alone, an incurably prejudicial group of words which, coming from the court in its charge, had all the force the jury under their

oath were bound to heed. "It is required that it (courts instruction) be so framed that a jury may not draw the wrong conclusion therefrom." *Miller v. United States,* 120 Fed. (2d) 972, and because thereof the jury were misled and confused in their deliberations thereby denying the defendant a fair and impartial trial.

VIII.

A fair and impartial trial was denied because the jury were not secluded.

Petitioner respectfully submits that the isolation of the jury and its aloofness and its care by trained and trustworthy bailiffs ought never to be abrogated. It is a protection to the jury itself. It is a protection to the prosecution. It is a protection to the defendant. It is not alone necessary to avoid evil—the thoughtful man avoids the appearance even thereof. The jury should all be kept together and it is unsafe to make any other rule.

In the case at bar the jury were drawn from a public exposed to frequent newspaper publications and radio newscasts at a time when the unhappy conditions arising out of the unnatural struggles of people at war creates new relations among the citizens, when people are confused, apprehensive and fearful, when feelings run high and passions rise.

This war involves the entire world, and the "melting pot" of the world, of which this District is strikingly representative, has not succeeded in refining the thoughts and

feelings of its polynationals to the degree that warrants and permits freedom from prejudice and bias predicated upon conditions abroad, where the very closest relatives of the foreign born American citizens are involved in this catastrophic world war.

In the present day and age, the courts take judicial notice of radio newscasts, newspaper publications that literally dramatize the events and color their news articles with editorial opinions, trying lawsuits before trial by inference, implication and innuendo. The Courts rightfully take judicial notice of the obvious.

On appeal to the Circuit Court of Appeals, Sixth Circuit, error was assigned that the court erred in exposing the jury to undue outside influences and public sentiment by not placing the jury in custody throughout the entire trial. The Honorable Circuit Court of Appeals in its opinion (R. Vol. II. p. 36) said, "There is nothing to indicate the appellant was in the least prejudiced by the separation of the jury." *Holt v. United States,* 218 U. S. 245, 251.

Petitioner in his brief in support of the original petition (B. 90-94) prayed that the circumstances surrounding the case at bar did not give defendant the fair trial which was his "sacred right." "There is no right more sacred than the right to a fair trial. There is no wrong more grievious than its negations. Jurors are human. * * * Any course is clearly illegal which would expose them to the danger of influence outside the court. If a single juror is improperly influenced, the verdict is as unfair as if all were. * * * The whole jury was exposed to, and actually encountered an outside influence." *Stone v. United States,* 113 Fed. (2d) 70 (C. C. A. 6th). The Brief for the United States in opposi-

tion to the original petition (P. 34) relies on *Holt v. United States*, as did the Honorable Circuit Court of Appeals, and argues that both the United States Attorney and Counsel for defendant informed the court that neither of them desired seclusion of the jury. Petitioner respectfully submits that trial counsel could not relinquish any substantial rights of the defendant and by the obvious tactical error of failure to insist that the jury be secluded did damage and prejudice defendant's rights to a fair and impartial trial. It is idle to say that "there is nothing in this record to indicate that the verdict returned reflected the jury's consideration of anything except competent proof adduced in the court room" (Br. for the United States in opposition, p. 34). The jury separated after each session of the Court to go to lunch at noon, and to their respective homes each night with nothing to protect them from exposure to hostile sentiment and outside influences except the admonition of the Court (R. Vol. II, pp. 7-13, 36). "When the judgment is weak, prejudice is strong, and it is essential to faith in the jury system that jurors should determine the facts submitted to them wholly on the evidence offered in open court, unbiased and uninfluenced by anything they may have seen and heard outside the actual trial of the case." *Stone v. United States*, 113 Fed (2d) 70. In the famous "Hat Trimming Case" *Meyer et al. v. Cadwalader*, 49 Fed. 32, Judge Acheson set aside a verdict in favor of the Government because of articles which had appeared in several newspapers of general circulation published in Philadelphia. *United States v. Ogden*, 105 Fed. 371.

"It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals and were scattered

broadcast over the community. The jury separated at the close of each session of the Court, and it is incredible that, going out into the community they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it." *Meyer et al. v. Calwalader*, 49 Fed. 32; *United States v. Ogden*, 105 Fed. 371; *cf. Griffin v. United States*, 295 Fed. 439; *Harrison v. United States*, 200 Fed. 669.

The case at bar is of vast importance to the federal jurisprudence and to the civil rights of the people. Careful study of *Holt v. United States* impels the Petitioner herein to pray that the principles therein announced do not decisively preclude him from the sacred right of a fair and impartial trial by the safeguard of a secluded jury in a capital case, particularly where the charge is treason.

IX.

The sentence is wholly disproportionate to the offense charged.

Petitioner respectfully directs the attention of this Honorable Court to the "Statement of Facts" in the Original Brief for Petition for a Writ of Certiorari (B. 26-29) "Plaintiff's Request to Charge" (R. 15), the opinion of the Circuit Court of Appeals, Sixth Circuit (R. Vol. II, p. 16), and the Indictment (R. 2-6) for a complete recital of the twelve acts charged as overt acts of treason.

A sentence cannot rest upon a general verdict of guilty where the indictment charges several alleged offenses (*McElroy v. United States*, 164 U. S. 76).

It is the duty of the Court to construe the penal provisions of statutes within the limitations prescribed by the Constitution Amendment VIII. To punish treason with either death or imprisonment lies within the discretion of the court but petitioner avers that "the provision of the Federal Constitution prohibiting cruel and unusual punishment is addressed to the Courts of the United States having criminal jurisdiction and is a limitation on their discretion." *Ex parte Watkins*, 7 Peters (U. S.) 568, 8 L. Ed. 786.

In the case at bar petitioner was charged with acts which do not contain the essential elements of a crime of any class. The proof adduced on the trial was irrelevant, incompetent and immaterial to the charge of treason; the general verdict of guilty as charged is in return to an indictment that is defective in substance, *United States v. Cruikshank*, 92 U. S. 542, 556; *cf. United States v. Carll* 105 U. S. 611; *United States v. Britton*, 107 U. S. 665, 669; *Evans v. United States*, 153 U. S. 587; the record is devoid of evidence adduced on the trial to prove overt acts of treason and no two witnesses testified to the same overt act of treason; the record fails to prove that the defendant had that condemned attitude of mind or committed any hostile act that exposed him as a traitor at heart or in fact; *United States v. Werner*, 247 Fed. 709; *United States v. Fries*, 9 Fed. Cas. No. 5126, p. 914; *United States v. Hanaway*, Fed. Cas. No. 15299 (2 Wall. Jr. 139); *Ex parte Bollman*, 8 U. S. (4 Cranch) 75; and that every act charged and proved was an act of assistance to an individual for his sole benefit.

"In determining whether defendant is guilty of adhering to, and giving aid and comfort the question of intent is a vital ingredient of the crime; and though he assisted an enemy alien, whom he knew to be such, he is not guilty where he intended merely to assist him as an individual, and not to give aid and comfort to enemies of the United States." *United v. States v. Fricke*, 259 Fed. 673.

Petitioner respectfully submits that he may be guilty of some violation of law, but that he is not guilty of the crime of treason and should not suffer the extreme penalty of death in violation of his substantial rights to his life and liberty as guaranteed him by the Constitution Amendment VI, Amendment VIII and Amendment XIV, Sec. 1.

What constitutes the elements essential to constitute an overt act of treason has never been determined by the Supreme Court of the United States or any inferior tribunal, and petitioner believing that it is a question vital to the people and to the federal jurisprudence prays that this Honorable Court hear the petitioner and set aside the sentence of death. "In times like these, when the public mind is agitated, when wars and rumors of war, plots, conspiracies and treasons excite alarm, it is the duty of the court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby establish precedents, which may become the ready tools of factions in times most disastrous. The worst of precedents may be established from the best of motives. We ought to be on our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may bring one criminal to punishment, we may furnish the means by which an hundred innocent persons

may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude." *United States v. Bollman*, 8 U. S. 75; *cf. United States v. Hoxie*, 26 Fed. Cas. No. 15407, at p. 399.

Conclusion

For the foregoing reasons petitioners respectfully urge that a rehearing be granted, that upon further consideration the order of April 5, 1943, denying petitioner a writ of certiorari be revoked, and that a writ of certiorari issue to the Circuit Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Certificate

We, the counsel for petitioner, hereby certify that the foregoing petition for rehearing is made in good faith and not for the purpose of delay.

NICHOLAS SALOWICH,
JAMES E. McCABE.